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The Right to Personal Safety and the Principle of Legality in the *Sharī'ah**

MUHAMMAD HASHIM KAMALI

Introduction

Criminal procedure is generally predicated on the twin but contrasting objectives of following the due judicial process and effectively controlling the crimes. Due judicial process tends to focus on providing the accused with various protections to minimize the possibility of unjust or arbitrary criminal convictions. It also seeks to facilitate an efficient administration of justice which promotes objectivity and coherence in trial proceedings. Crime control, by contrast, emphasizes a broader social interest in crime detection and prevention, and tends to somewhat limit procedural protections for the accused so as to ensure an efficient prosecution and conviction of the guilty.[1]

Islamic criminal procedure also faces this dilemma and seeks to strike a fair balance between the interests of the accused and those of the society. Specific procedural safeguards are occasionally prescribed by the Qur'ān and/or the *Sunnah*, but have generally been left to the discretion of the ruler. Under the doctrine of *siyāsah shar'iyyah*, or *Sharī'ah*-oriented policy, the ruler is authorized to take measures and devise procedures that are in harmony with the goals and objectives of the *Sharī'ah* and which seek to secure public interest as best as possible. Simple and direct detection and trial procedures that were deemed adequate for earlier times may not be sufficient for more complex societies where progress in various fields has also opened new avenues for more sophisticated levels of criminality and abuse. The integrity of a procedural system under these circumstances is tested by its openness to refinement and growth. Since procedural matters in the Islamic system of justice are open to considerations of public policy and justice under *siyāsah shar'iyyah*, the process remains, in principle, open to further development and refinement.

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*This is a somewhat revised version of a paper presented at the International Conference on Islamic Criminal Judicial Procedure organized by the Centre of Islamic Studies, School of Oriental and African Studies, University of London, 22-23 October, 1998.

[1]Cf. Herbert Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1969), 140 ff.

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This essay is presented in seven sections, beginning with a preliminary discussion over the definition and scope of *ḥaqq al-amn*, which is followed, in section two, by an enquiry into the source evidence of the Qur'ān and *Sunnah* and the early precedent of the Pious Caliphs on this subject. Section three is devoted to an examination of the principle of legality in the *Sharī'ah*. Section four addresses the twin concepts of accusation (*al-tuhmah*) and suspicion (*al-ẓann*) which lead to the discussion, in the next section, on arrest and detention and the debate that has arisen among the *'ulamā'* over the basic permissibility of preventive detention. Section six enquires into the permissibility or otherwise of beating the accused, in certain types of accusations, during interrogation. The last section discusses the right to counsel.

The larger part of this essay consists of a presentation of evidence in the *Sharī'ah* as found in the sources that have been consulted. On certain issues where the evidence remains somewhat less than conclusive, and matters on which the *'ulamā'* are themselves in disagreement, I have advanced a certain perspective that is reflective of my own understanding of the source evidence.

I

DEFINITION AND SCOPE

The individual's right to personal safety may be defined as his right to live a peaceful life without fear of aggression, unlawful arrest, detention and punishment. The assurance, in other words, is that his personal safety is inviolable and shall not be compromised nor subjected to coercion and abuse except under the law.[2] Some writers have, however, expanded the scope of this right to include not only the personal safety of the individual but also the safety of his property and honour. Thus, according to an alternative definition, the right to safety (*ḥaqq al-amn*) means the safety of the person, and of his property and honour against aggression, humiliation and torture by other individuals or the state.[3] Another writer has simply described *ḥaqq al-amn* as the inner assurance and absence of fear in the mind of the individual regarding his personal safety.[4] Notwithstanding the likelihood that aggression against the property and honour of the individual also implies aggression against his person because personal property and honour are matters regarding which the law

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[2]Cf. 'Abd al-Ḥamīd Mutawallī, *Mābādī Niẓām al-Ḥukm*, 4th ed. (Alexandria: Mansha'at al-Ma'ārif, 1974), 148; 'Uthmān 'Abd al-Mālik al-Ṣāleḥ, "The Right of the Individual to Personal Security", in Cherif Bassiouni, *Islamic Criminal Justice* (London: Oceana Publications, 1982), 56.

[3]Ismā'īl Badawī, *Da'ā'im al-Ḥukm fī'l-Sharī'ah al-Islāmiyyah wa al-Nuẓum al-Dustūriyyah al-Mu'āṣirah* (Cairo: Dār al-Fikr al-'Arabī, 1400/1980), 91; Aḥmad Fu'ād 'Abd al-Mun'im, *Uṣūl Niẓām al-Ḥukm* (Alexandria: Mu'assasat Shabāb al-Jāmi'ah, 1411/1991), 263; 'Abd al-Ḥakīm Ḥasan al-'Īlī, *al-Ḥurriyyāt al-'Āmmah* (Kuwait: Dār al-Kitāb al-Ḥadīth, 1403/1983), 363.

[4]Muḥammad Sālim al-Ghazzāwī, *al-Ḥurriyyah al-'Āmmah fī'l-Islam* (Alexandria: Mu'assasat Shabāb al-Jāmi'ah, n.d.), 25.

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takes separate measures, it is preferable perhaps to confine the scope of *ḥaqq al-amn* to aggression against the person of the individual in the sense of physical aggression, unlawful detention, and violation of his right to due process. The right to due process relates, in turn, to the principle of the rule of law, also known as the principle of legality, which contemplates a legal regime that regulates investigation and trial procedures, and protects the individual against any abuse by the coercive power.

II

EVIDENCE IN THE QUR'ĀN AND *SUNNAH*

The rules of the *Sharī'ah* pertaining to the right to safety proceed from the Qur'ānic affirmation of the dignity of man and its recognition of the *homo sapiens* as the crown of God's creation who must, therefore, be treated with justice and dignity. The Qur'ān is replete with warnings against tyranny and persecution, there being no less than 299 instances of it in the Qur'ān, just as it is emphatic on the value of justice and fair treatment to all without any discrimination.[5] Rights and liberties in Islam are thus seen as a manifestation of the dignity of man which was bestowed by God on the human race. The Qur'ān thus proclaims: "And surely We have honoured the progeny of Adam: We carry them in the land and the sea; We provided them with good things and exalted them over most of those whom We have created". (*al-Isrā'* 17: 70) The reference to the dignity of man in this verse is substantiated by the rank he is given over most of God's creatures as well as by the affirmation of his freedom of movement to traverse the land and the sea in order to utilize the resources of the earth.

Other manifestations of human dignity in the Qur'ān are found in references to the physical and spiritual attributes of man and in such statements in the Qur'ān as the following: "We created man in the best of forms" (*al-Tīn* 95: 4); "I breathed into him of My spirit" (*Ṣād* 38: 71). Likewise, the Qur'ān mentions God's command to angels to prostrate themselves before Adam (*al-Baqarah* 2: 34), which clearly suggests an exalted spiritual status for Adam. More specifically, the Qur'ān entitles the individual to safety against aggression when it declares, in the broadest of terms, that "there shall be no hostility (*'udwān*) except against the aggressors (*ẓālimīn*)" (*al-Baqarah* 2: 193). Aggression is thus recognized as the only ground that validates recourse to hostile action against anyone. Islamic law, in other words, validates the use of force for defensive purposes both in matters pertaining to individuals and in matters pertaining to war and peace. The Qur'ān further specifies that a hostile

[5]Cf. Cherif Bassiouni, *The Islamic Criminal Justice*, 19.

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response to aggression must not exceed the limits of reciprocity and justice:

> Whoever is aggressive toward you then your response may be proportionate to the aggression that was inflicted upon you (in the first place); and fear God, for God is with those who are God-fearing. (*al-Baqarah* 2: 194)

> Whoever forgives and makes peace, God will reward him for it. Verily God loves not the transgressors. (*al-Shūrā* 42: 4)

Violation of the limits set by God, or a deliberate disregard of the rule of law, is equated with *ẓulm*, as the Qur'ān declares:

> Those who transgress the limits that God has laid down are indeed the transgressors (*ẓālimūn*). (*al-Baqarah* 2: 229)

The Qur'ān thus envisages an orderly life in the community which is observant of the rule of law and the limits of just and peaceful behaviour. Unlike the image that is often portrayed of the *Sharī'ah* – one ever prone to inflict punishments – there is such overwhelming evidence in the Qur'ān for recourse to leniency, forgiveness, and compassion that this attitude can be considered an integral part of the *Sharī'ah*. There can be no doubt about the resolute attitude that the *Sharī'ah* takes toward lawlessness and transgression. Yet this attitude is tempered with its opposite pull on the side of compassion and understanding of the offender and the causes that led him to a deviant behaviour. The Qur'ān thus declares:

> Whoever repents after his wrongdoing (*ẓulm*) and reforms himself, God will turn to him (with mercy). Surely God is Forgiving, Merciful. (*al-Mā'idah* 5: 39)

The law, in the meantime, grants the victim of *zulm* the right to defend himself, as the Qur'ān proclaims:

> And whoever defends himself after having been oppressed, he is not to be blamed. (*al-Shūrā* 42: 41)

The victim of the aggression is, in turn, counselled in the following terms:

> And if you decide to punish, then punish with the like of that with which you were afflicted. But if you show patience, it is certainly best for those who remain patient. (*al-Naḥl* 16: 126)

The Qur'ānic rule of reciprocity and equivalence in the use of force should, in other words, be tempered by one's dedication to the right cause, patience and self-restraint. The Qur'ān thus not only recommends patience in the sense of not insisting on reprisal but also urges that one should not be rash in the enforcement of penalties and allow time and opportunity for forgiveness,

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reconciliation and reform.

The *Sunnah* of the Prophet (peace be on him) is also emphatic on the inviolability of the personal right to safety, as declared in the following *ḥadīth*:

> All that belongs to a Muslim is forbidden to his fellow Muslim - his blood, his honour and his property.[6]

The *ḥadīth* here begins with a general reference to all of the basic rights of the individual (the word Muslim in this *ḥadīth*, in my view, can legitimately be replaced by the expression 'human being' and declared them all to immune from aggression). The *ḥadīth* specifies three of these, namely life, property and honour, as being the most important. The general reference of this *ḥadīth* to "all that belongs to a Muslim", when read together with the universal Qur'ānic affirmation of the dignity of man, serves to show that the *Sharī'ah* takes an affirmative stand on all of the basic rights of man, whether specified or unspecified. Any right or liberty that is deemed complementary to human dignity is, therefore, protected and upheld. The substance of the above *ḥadīth* is endorsed by another *ḥadīth* which declares:

> Muslims are brethren: none may commit acts of aggression against his brother nor humiliate and degrade him. One who helps his brother in need, God will help him in his own moment of need.[7]

According to yet another *ḥadīth*:

> The back [or flesh] of a believer is safe (against punishment) unless it be for a right or a transgression of a limit set by God.[8]

Protecting the individual against physical aggression, annoyance, intimidation and espionage is the explicit theme of a large number of *aḥādīth* whose perusal leaves no doubt that the overall attitude which is conveyed by them is not a matter merely of conformity to rules, but one which partakes in the integrity of the believer's commitment to his religious faith. To quote but a few of these:

> Do not cause annoyance (*lā tu'dhū*) to Muslims, nor revile them, and do not go after (and expose) their hidden faults. For whoever goes after (and exposes) the

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[6]Muslim ibn Ḥajjāj al-Nishābūrī, *Mukhtaṣar Ṣaḥīḥ Muslim*, ed. Muḥammad Nāṣir al-Dīn al-Albānī, 2nd. ed. (Beirut: Dār al-Kitāb al-Islāmī, 1404/1984), 473, *ḥadīth* no. 1775.

[7]Ibid.

[8]Muḥammad ibn Ismā'īl Bukhārī, *Ṣaḥīḥ al-Bukhārī*, tr. Muhammad Muhsin Khan, 6th ed. (Lahore: Kazi Publications, 1986), 8: 510, Kitāb al-ḥudūd, *ḥadīth* 776; Ya'qūb bin Ibrahīm Abū Yūsuf, *Kitāb al-Kharāj* (Cairo: al-Maṭba'ah al-Salafiyyah, 1396 A.H.), 163.

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> hidden faults of his Muslim brother, God will go after his hidden faults and will disgrace him...[9]

> It is not permissible for a Muslim to intimidate another Muslim.[10]

The same message has been more emphatically conveyed in another *ḥadīth* as follows:

> Do not intimidate a Muslim, for intimidating a Muslim is an act of grave transgression (*ẓulmun 'aẓīm*).[11]

According to yet another *ḥadīth*:

> God will punish in the Hereafter those who torture others in this life.[12]

The provisions of the Qur'ān and *Ḥadīth* on the right to safety apply equally to all individuals regardless of their religious, economic or social status. The Prophet (peace be on him) has declared: "Men are equal like the teeth of a comb. No Arab is superior to a non-Arab except by dint of piety".[13] The law must, therefore, be applied to all individuals alike. To emphasise this point, the Prophet (peace be on him) stated that even if his own daughter Fāṭimah were to commit theft, she would be treated as any other offender and subjected to the prescribed punishment.[14]

From his reading of the source evidence 'Abd al-Wahhāb Khallāf has concluded that "all the evidence that is found in the Book of God and the *Sunnah* of His Messenger on the prohibition of hostility (*'udwān*), oppression (*ẓulm*), harm (*ḍarar*) and annoyance (*īdhā'*) to others is premised on the inviolability of the right to personal safety (*ḥaqq al-amn*) and safe conduct of all human beings against all forms of aggression and abuse".[15] Violating the individual's right to safety is, in other words, prohibited and it is in principle a right which is not amenable to be disregarded or compromised.

This attitude of the *Sharī'ah* is well illustrated by the following examples. The Caliph 'Umar b. al-Khaṭṭāb used to meet his officials during the *Ḥajj* season. On one such occasion the Caliph addressed his officials and asked them to avoid humiliating people or subjecting them to physical abuse and

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[9]Abū 'Īsā Muḥammad al-Tirmidhī, *Sunan al-Tirmidhī* (Beirut: Dār al-Fikr, 1400/1980), 3: 255, Kitāb al-Birr, Bāb mā jā' fī Ta'ẓīm al-Mu'min, *ḥadīth* no. 84.

[10]Ibid, 4: 16, Kitāb al-Diyyāt, *ḥadīth* no. 1395.

[11]Bukhārī, *Ṣaḥīḥ al-Bukhārī*, 1: 110, *ḥadīth* no. 48.

[12]Abū 'Ubayd al-Qāsim ibn Sallām, *al-Amwāl*, ed. Muḥammad Ḥāmid al-Faqī (Riyadh: Maṭba'at al-Ḥijāzī, 1353 A.H.), 42.

[13]A statement made on the occasion of the Farewell Pilgrimage (*Ḥajjat al-widā'*).

[14]Bukhārī, *Ṣaḥīḥ al-Bukhārī*, 8: 512, *ḥadīth* no. 778.

[15]'Abd al-Wahhāb Khallāf, *Siyāsah Shar'iyyah fī'l-Shu'ūn al-Dustūriyyah wa'l-Khārijiyyah wa'l-Māliyyah* (Kuwait: Dār al-Qalam, 1408), 31.

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misappropriation of their property. The Caliph then pledged that he would personally see to it that those who violated these rights were subjected to retaliation. Then the Governor of Egypt, 'Amr b. al-'Āṣ, who was present when the Caliph issued the directive, asked whether the Caliph would retaliate even in those cases in which the government officials had disciplined (*addaba*) the members of the public. The Caliph replied: "By Him in Whose Hand is the life of 'Umar, I shall indeed retaliate, for I have seen that the Messenger of God subject even himself to retaliation".[16]

Anas b. Mālik has reported another incident that also involved 'Amr b. al-'Āṣ. His son Muḥammad b. 'Amr b. al-'Āṣ had lashed an Egyptian apparently for no reason other than that he was his competitor in horse racing. The man then complained to the Caliph and the Caliph summoned both the Governor and his son and ordered that the victim may retaliate by lashing the culprit, which he did. The Caliph then asked the man also to lash the Governor. His argument was: "You would not have been struck, were it not for the fact that he was the Governor's son". But the man felt satisfied at lashing the person who had lashed him. The Caliph then said: "I would not have intervened if you had in fact lashed the Governor". The Caliph then turned to the Governor and said: "Since when have you begun to enslave those whom their mothers had borne as free persons"?[17]

The *Sharī'ah*'s recognition of life as one of the five essential values (*al-ḍarūriyyat al-khamsah*) is a recognition simultaneously of the right of every individual to personal safety and to honourable life. The *Sharī'ah* recognises this as one of its overriding values alongside such other values as the immunity of one's right to practice one's faith, to own property, to have a family, and the right to protect one's intellect. In its positive sense, this last right means the right to seek knowledge and, in its negative sense, it means the right to be protected against corrupt influences, such as drugs, liquour, etc. All measures that protect and promote these values are consequently upheld by the *Sharī'ah*.[18]

The right to personal safety applies equally to pre-trial procedures involving criminal investigation and collection of evidence against the accused. The latter is, in principle, entitled to safe conduct, especially when he or she is not notorious for criminality and corruption. The accused may neither be exposed to pressure, nor persecuted so that he might incriminate himself.

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[16]'Abd al-Mālik ibn Hishām, *Sīrat al-Nabī* (Beirut: Dār al-Fikr, n.d.), 1: 625; Muḥammad Abū Zahrah, *al-Tanẓīm al-Islāmī li'l-Mujtama'* (Cairo: Maṭba'at Mukhaymar, n.d.), 230.

[17]Abū 'Abd Allāh Muḥammad 'Abd al-Malik ibn Sa'd, *al-Ṭabaqāt* (Beirut: Dār Ṣādir, n.d.), 3: 293; Fu'ād Aḥmad, *Uṣūl*, 266; Muḥammad Fathī 'Uthmān, *Ḥuqūq al-Insān bayn al-Sharī'ah al-Islāmiyyah wa al-Fikr al-Qānūnī al-Gharbī* (Cairo: Sharikat Maṭābi' al-I'lānāt, 1382/1962), 79.

[18]Cf. Abū Isḥāq Ibrāhīm al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām* (Cairo: Maṭba'at al-Salafiyyah, 1341 A.H.), 2: 3–5 and passim; Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Text Society, 1991), 271 ff.

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Should there be a confession by the accused it must be free and voluntary as any amount of pressure and coercion mars the integrity of a confession and is likely to lead to the suspension of punishment. This is the requirement of the *ḥadīth* which categorically declares to "drop the prescribed penalties in all cases of doubt".[19] A confession that is obtained under pressure is doubtful and fails to serve its purpose. The Caliph 'Umar b. al-Khaṭṭāb refused to give credence to confessions made in the state of fear, and went on record to say: "A man would not be secure when he is in pain, frightened or imprisoned in order to make a confession and incriminate himself".[20] The law enforcement officer, the head of the state, and the judge are generally counselled not to be eager to enforce penalties. This is the purport of the remainder of the above *ḥadīth*, which is as follows: "Drop the prescribed penalties *(ḥudūd)* whenever you can. When you can find a way out for a Muslim, then clear his way. For if the *Imām* errs, it is better that he errs on the side of leniency than on the side of punishment".[21]

Abū Yūsuf (d. 182 A.H.), the Chief Justice of the Abbasid state under Hārūn al-Rashīd, wrote that when a person is accused of the crime of theft or any other crime, he may "neither be beaten nor promised anything nor intimidated in order to elicit a confession from him". Abū Yūsuf added that anyone who, under compulsion, confesses to an offence, including murder and theft, "is not liable to the prescribed punishment and his confession shall be devoid of effect".[22] It is also reported that during the time of the Companions someone by the name Ṭāriq, who was accused of kidnapping a man from Syria, was beaten until he confessed. 'Abd Allāh ibn 'Umar issued the legal opinion that "no punishment may be applied as the confession was made after the accused was beaten". Ibn 'Umar also added that people may not be arrested on the basis of mere accusation, and no claim of theft or murder should be admitted unless it is supported by upright witnesses or a confession that is free of threat and intimidation. He added further that it was unlawful to imprison a man on grounds of mere suspicion. The Prophet (peace be on him) would not arrest people on the basis of suspicion alone. But it is proper that the claimant and defendant are brought together before the court. If there is evidence, the claim should be adjudicated, otherwise the defendant should be released or asked to give a surety.[23] "The judge has no powers", wrote al-Māwardī (d. 450 A.H.), "to

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[19]Cf. Al-'Īlī, *Ḥurriyyāt*, 369; al-Ṣāleḥ, "The Right of the Individual", in Bassiouni, *Islamic Criminal Justic*, 56.

[20]Abū Yūsuf, *Al-Kharāj*, 190.

[21]*Ibid.*, 164 and 'Abd Allāh al-Khaṭīb al-Tabrīzī, *Mishkāt al-Maṣābīḥ*, ed. Muḥammad Nāṣir al-Dīn al-Albānī 2nd. ed. (Beirut: al-Maktab al-Islāmī, 1399/1979), *ḥadīth* no. 3570.

[22]Abū Yūsuf, *al-Kharāj*, 175; see also Burhān al-Dīn Ibrāhīm b. 'Alī ibn Farḥūn, *Tabṣirat al-Ḥukkām fī Uṣūl al-'Aqdiyah wa Manāhij al-Aḥkām*, ed. Ṭāhā Sa'd (Cario: Maktabat Kulliyyāt al-Azhariyyah, 1804/1986), 2: 158.

[23]Ibid., 190–91.

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detain anyone unless it is for the violation of a right that is clearly established".[24]

Abū Yūsuf also wrote that the state must ensure that the prisoners are not in dire need and must assign to the needy among them, both men and women, a monthly payment that is sufficient for their food, besides providing them with clothing in summer and winter, and also meet their funeral expenses in the event of death. Prisoners are entitled to safe and fair treatment that precludes intimidation and torture. The precedent for this, Abū Yūsuf added, was set by the Pious Caliphs, especially the fourth Caliph, 'Alī b. Abī Ṭālib, who laid down the rule that the prisoners would receive allowances from the public treasury unless they were affluent, in which case the expenditure on their needs would be drawn from their own property.[25] Abū Yūsuf has also quoted, in this connection, the Caliph 'Umar ibn 'Abd al-'Azīz's letter which he sent to his officials saying that they must ensure that "none of the Muslims in their prisons is restricted to the extent that he cannot stand upright to perform his prayer, and that no one is restricted to the extent that he is unable to sleep at night, except for those who are wanted for murder. They should all be given charitable donations that would improve their basic food and the variety of the food they eat".[26]

We turn next to an examination of the principle of legality and the extent of its application in Islamic law.

III

THE PRINCIPLE OF LEGALITY

This principle of legality means that no one may be incriminated or punished unless it be on grounds of a legal text which specifically defines the crime and the punishment in question. It also means that the judge may not punish anyone merely on the basis of his whims unless the required legal evidence and proof exist. Moreover, the legal text that is applied must have been in existence at the time when the offence was committed. The law may not, in other words, be enforced retroactively. It also means that only the offender and no one else may be held responsible for his offence. The requirement of due process in interrogation and trial is also designed to ensure that the accused is protected against abuse of power. The principle of legality is thus essentially

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[24]Abū 'l-Ḥasan al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah* (Cairo: Maṭba'at al-Sa'ādah, 1327/1909), 193.

[25]Abū Yūsuf, *al-Kharāj*, 51–63; al-'Īlī, *Ḥurriyyāt*, 369; see also al-Ṣāleḥ, "The Right of the Accused to Personal Security", in Bassiouni, *Islamic Criminal Justice*, 85.

[26]Abū Yūsuf, *al-Kharāj*, 162; al-'Īlī, *Ḥurriyyāt*, 370.

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concerned with the limitation of the power of the state and its operation acquires special significance in the area of criminal law.[27]

Islamic constitutional theory is explicit on the principle of limitation of the power of the state under the rule of law. The Islamic state is, accordingly, bound to administer and uphold the *Sharī'ah*.[28] There is no place in Islam for arbitrary rule by a single individual or a group. The basis of all decisions and actions in an Islamic polity should not be the whims and caprices of individuals, but the *Sharī'ah*.[29] The *'ulamā'* have unanimously held the view that the head of state and the government officials are accountable for their conduct like everyone else, and also that they too are bound by the decisions of the courts of justice like anyone else. In response to the question as to how can the decision of a *qāḍī*, who is an employee of the head of the state (*Imām*), be binding on the *Imām*, it is pointed out that the judge discharges his duty not as an employee of the *Imām* himself, but as a representative of the community whose task it is to implement the *Sharī'ah*. There is, therefore, no recognition of special privileges for anyone and equality before the law and before the courts of justice is clearly recognized for all citizens alike.[30] It is once again indicative of the high priority that Islam accords to the rule of law that it frees the citizen of the duty to obey the political authority in matters where the latter violates the law. This is the clear message of the *ḥadīth* which declares:

> There is no obedience in transgression; obedience is in lawful conduct only.[31]

According to another *ḥadīth*:

> There is no obedience to a creature when it involves disobedience of the Creator.[32]

Based on the unequivocal authority provided in a number of similar *aḥadīth*, Sayyid Abū 'l-A'lā Mawdūdī (d. 1979) has drawn the conclusion that "Islam confers on every citizen the right to refuse to commit a crime, should any government or administrator order him to do so".[33] Maḥmasānī has concurred with Ibn Khaldūn that the sovereignty of an Islamic state is limited

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[27]Cf. Ṣubḥī Maḥmaṣānī, *Arkān Ḥuqūq al-Insān fi'l-Islām* (Beirut: Dār al-'Ilm li'l-Malāyīn, 1979), 107–8.

[28]Muḥammad Fārūq al-Nabhān, *Niẓām al-Ḥukm fi'l-Islām* (Kuwait: Maṭbū'āt Jāmi'at al-Kuwayt,' 1974), 167.

[29]Hamid Enayat, *Modern Islamic Political Thought* (London: The Macmillan Press, 1982), 128.

[30]Cf. Abū Zahrah, *Tanzīm*, 34–35; Mutawallī, *Mabādī*, 387; Ghazzāwī, *al-Hurriyyah*, 26.

[31]Muslim, *Ṣaḥīḥ Muslim*, Kitāb al-Amānah, Bāb Wujūb Tā'at al-Umarā' fī Ghayr al-Ma'ṣiyah wa Taḥrīmuhā fī'l-Ma'ṣiyah, *ḥadīth* no. 39. This *ḥadīth* is reported in both Bukhārī and Muslim.

[32]Abū Dāwūd al-Sijistānī, *Sunan Abū Dāwūd*, tr. Ahmad Hasan (Lahore: Ashraf Press, 1984), *ḥadīth* no. 2285.

[33]Sayyid Abū'l A'lā Mawdūdī, *Human Rights in Islam* (Leicester: The Islamic Foundation, 1976), 33.

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in so far as the state in Islamic law is under obligation to comply with the *Sharī'ah*. Hence when the state issues a command that violates the *Sharī'ah*, the citizen is no longer under the duty to obey that command.[34]

The *Sharī'ah* safeguards the life, honour and liberty of the citizen by laying down a set of principles which are designed to ensure due process in the administration of justice. Included in these is the presumption of original non-liability (*barā'at al-dhimmah al-aṣliyyah*) which simply means that no one is guilty of a crime unless his guilt is proved through lawful evidence.[35] The presumption of innocence is not overruled by a mere accusation, which is not devoid of doubt, and doubt does not negate certainty. The certainty here is the prior innocence of the accused. The principle of legality also entitles the accused to defend himself and attend his own trial. This is established by a *ḥadīth* in which the Prophet (peace be on him) is reported to have counselled 'Alī ibn Abī Ṭālib when the latter was sent as judge to Yaman:

> When the litigant presents himself before you, do not pass a judgment unless you hear the other party in the same way as you hear the first.[36]

In a similar vein, Islamic law does not permit the judge to sentence a person in the latter's absence. The defendant must, in other words, be present in the court or be represented by an authorized person.[37] There is some disagreement among the Ḥanafīs and Shāfi'īs as to whether an accusation by itself can weaken the force of the original principle of non-liability. The Ḥanafīs maintain that it does, but the Shāfi'īs hold that a mere claim or accusation does not affect the original absence of liability, or innocence of the accused. It is important, as al-Ṣāleḥ has rightly noted, that the presumption of innocence is strictly upheld, as the accused will otherwise be faced with the onerous, if not impossible, task of proving that he did not commit the crime.[38]

Anyone, be it the individual or the state, accusing a person of an offence must prove it beyond reasonable doubt.[39] The burden of proof lies on the plaintiff, a principle which is based on the following *ḥadīth*:

> The burden of proof is on him who makes the claim, whereas the oath [denying the charge] is on him who denies.[40]

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[34]Maḥmaṣānī, *Arkān*, 94.

[35]Abū Yūsuf, *Kitāb al-Kharāj*, 152.

[36]Abū Dāwūd, *Sunan*, tr. Ahmad Hasan, *ḥadīth* no. 3582; Maḥmaṣānī, *Arkān*, 107.

[37]'Abd al-Wahhāb al-Sha'rānī, *Kitāb al-Mīzān* (Cairo: al-Maṭba'ah al-Ḥusayniyyah, 1329 A.H.), 2: 165; see also al-Awad M. Awad, "The Rights of the Accused under Islamic Criminal Procedure", in Bassiouni, *Islamic Criminal Justice*, 94.

[38]Cf. Al-Ṣāleḥ, "The Right of the Individual to Personal Security", in Bassiouni, *Islamic Criminal Justice*, 66.

[39]Maḥmaṣānī, *Arkān*, 106.

[40]Abū Bakr Aḥmad ibn al-Ḥusayn al-Bayhaqī, *al-Sunan al-Kubrā* (Beirut: Dār al-Fikr, n.d.); Kitāb al-Da'wā wa al-Bayyināt, Bāb al-Bayyinah 'alā al-Mudda'ī wa al-Yamīn 'alā al-Mudda'ā 'alayh.

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The plaintiff, in other words, may ask the court to put the defendant on oath if the latter denies the claim. If the claimant is required to prove his allegation, then it would follow that until such proof is forthcoming, the defendant is presumed to be innocent. This is also upheld in another *ḥadīth* which provides:

> If men were to be granted what they claim, some will claim the lives and properties of others. The burden of proof is on the claimant, and an oath is incumbent on him who denies.[41]

According to Ibn Qayyim al-Jawziyyah (d. 598/1350), if a claimant supports his claim by evidence, the court will adjudicate in his favour, otherwise the last word is that of the defendant and the court will accept what he says provided he takes a solemn oath to affirm that he is telling the truth.[42]

Punishment is not executed unless there is proof to establish the guilt, and hearsay evidence is not admissible in the execution of penalties. Ibn Taymiyyah (d. 728/1328) wrote that at the time of the Prophet (peace be on him) a woman in Madīnah who had a bad reputation as regards her sexual conduct so much so that the Prophet (peace be on him) said concerning her: "If I were to stone anyone without evidence, I would have stoned this woman".[43] Ibn Taymiyyah also quotes a statement of the Caliph 'Umar ibn al-Khaṭṭāb to the effect that no one may be punished on the basis of suspicion and mistrust. Al-Qarāfī and Ibn Farḥūn have specified that proof means the evidence that is sound and free of doubt and loopholes, one that has met all its proper conditions and leads to a definite result. Ibn al-Qayyim has observed that offenders are not punished without proof and proof comes either from the offender when he/she makes a confession, or what might amount to a confession, or else it is provided independently. In both cases, the proof must be sound, free of doubt, and without recourse to spying.[44]

Confession in crimes, but not in civil disputes, can be withdrawn even after the sentence has been passed or during its execution. Once a confession is so withdrawn, particularly in the prescribed *ḥadd* offences, the punishment may not be carried out. For withdrawal in this manner gives rise to doubt (*shubhah*) which would in turn obstruct the enforcement of punishment.[45] For a confession to be valid, the confessor must also be in full possession of his

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[41]Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, *ḥadīth* 1053; Abū 'Abd Allāh Muḥammad ibn Abū Bakr ibn al-Qayyim, *al-Ṭuruq al-Ḥukmiyyah fi'l Siyāsah al-Shar'iyyah*, ed. Muḥammad Ḥāmid al-Faqī (Cairo: Maṭba'at al-Sunnah al-Muḥammadiyyah, 1372/1993), 94.

[42]Ibn al-Qayyim, *al-Ṭuruq*, 28.

[43]Taqī al-Dīn Ibn Taymiyyah, *al-Siyāsah al-Shar'iyyah fī Iṣlāḥ al-Rā'ī wa al-Ra'iyyah* (Cairo: Dār al-Kitāb al-'Arabī, 1951), 153.

[44]Shihāb al-Dīn al-Qarāfī, *Kitāb al-Furūq* (Cairo: Maṭba'a Dār al-Iḥyā, 1346 A.H.), 5: 54; Ibn Farḥūn, *Tabṣirah*, 1: 131; Ibn Qayyim, *I'lām*, 2: 87.

[45]Al-Sha'rānī, *Kitāb al-Mizān*, 2: 137; Muḥammad Saleem El-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust Publicaitons, 1982), 128.

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faculties. Confession must, in addition, be true in that it does not seek to conceal the truth in order merely to protect another person, or a group of persons. When the cause and underlying intention of a mendacious confession is known to the judge, he is under duty to reject it.[46] A valid confession needs to be specific and categorical. If it is ambiguous to the extent that it requires interpretation, it is not admissible. Hence it is not enough if someone says merely that "I committed adultery" or that "one of us committed theft". Both statements are vague as they fail to provide relevant details and do not, therefore, amount to valid proof.[47]

Judicial decisions must be based on apparent truth which is substantiated by valid evidence. The hidden truth, should there be any, is considered to be a matter between the individual and his Creator and it lies beyond the immediate concern of the court. In 'Abd al-Wahhāb al-Sha'rānī's (d. 973/1565) words: "God Most High has ordered us to settle disputes among people on the basis of visible proof, and leave the rest to the Day of judgment".[48] This conclusion is supported by the following *ḥadīth* in which the Prophet (peace be on him) is reported to have said:

> I am but a human being. When you bring a dispute to me, some of you may be more eloquent in stating their case than others. I may consequently adjudicate on the basis of what I hear. If I adjudicate in favour of someone a thing that belongs to his brother, let him not take it. For it would be like taking a piece of fire.[49]

The Prophet (peace be on him), in other words, has confirmed that he adjudicated disputes only on the basis of the evidence that was presented to him.

Evidence must be allowed to be given in an atmosphere of impartiality. It is a generally agreed upon rule of the Islamic law of evidence that the judge must avoid indicating to the witnesses as to what should be the content of their witness; instead, he should hear what they have to say.[50] The Qur'ān demands impartiality in the administration of justice. The witnesses, the judges and the law enforcement authorities are accordingly required to:

> Stand firmly for justice as witnesses to God, even if it be against yourselves, your parents or your relatives, and whether it be (against) the rich or poor, for God can best protect both. Follow not the lust (of your hearts) lest it detract you from the course of justice. (*al-Nisā'* 4: 135)

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[46]Ibn al-Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, 5; Saḥnūn ibn Sa'īd al-Tanūjī, *al-Mudawwanah al-Kubrā* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1994), 4: 293. Bandar ibn Faḥd al-Suwaylim, *al-Muttaham: Mu'āmulatuhu wa Ḥuqūquhu fi'l-Fiqh al-Islāmī* (Riyadh: al-Maṭābī' al-Amniyyah, 1408/1988), 184.

[47]Muḥammad al-Khaṭīb al-Sharbīnī, *Mughnī 'l-Muḥtāj ilā Ma'rifat Ma'ānī al-Minhāj* (Cairo: Dār al-Fikr, n.d.), 4: 150; Fahd al-Suwaylim, *al-Muttaham*, 187–188.

[48]Al-Sha'rānī, *Kitāb al-Mizān*, 2: 166.

[49]Abū Dāwūd, *Sunan*, tr. Ahmad Hasan, *ḥadīth* no. 3576.

[50]Al-Sha'rānī, *al-Mizān*, 2: 169.

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This Qur'ānic emphasis on impartiality in the administration of justice obviously means that investigation and trial procedures must, from the beginning to the end, be impartial and objective.

The Qur'ānic rule with reference to sentencing is that it proscribes excess in retaliation and punishments that are out of line with the offence itself. We note, once again, the following Qur'ānic directive, which is addressed to all parties in judicial disputes, including the law enforcement authorities and the state:

> Whoever is aggressive toward you, then your response must be proportionate to the aggression that was inflicted on you. (*al-Baqarah* 2: 194)

The Qur'ān further lays down the principle that no one may be accused or punished for an offence committed by another person:

> Everyone is accountable for his own deeds, and no soul shall bear the burden of another. (*al-An'ām* 6: 164)[51]

This is stressed in a *ḥadīth* to the effect that:

> No person may be incriminated for a crime committed by another person.[52]

The Qur'ān, addressing the Prophet, lays down:

> We revealed to you the scripture with the truth that you may judge between people by that which God has shown to you, and do not be a pleader for the treacherous. (*al-Nisa'* 4: 105)

This verse was revealed concerning a dispute between a Muslim and a Jew. In this case the Muslim, Ṭu'mah ibn Ubayraq, had stolen a coat of mail. He hid it in the house of a Jew and later accused the latter of theft. He was supported in his false accusation by his tribe. The Prophet (peace be on him) cleared the Jew of the charge but Ibn Ubayraq fled and renounced Islam. The following two verses were also revealed concerning the same case:

> Whoever commits a sin only makes himself liable for it ... and whoever commits a delinquency and then throws the blame thereof upon the innocent, he has burdened himself with falsehood and a flagrant crime. (*al-Nisā'* 4: 111–112)[53]

This Qur'ānic principle marked a departure from the ancient Arab tendency to go to excesses in retaliation and revenge. The Arabs sometimes

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[51]Maḥmūd Shaltūt, *al-Islām: 'Aqīdah wa Sharī'ah* (Beirut: Dār al-Shurūq, 1985), 327; see also Al-Sha'rānī, *al-Mīzān*, 2: 125.

[52]Muḥammad ibn 'Alī ibn Muḥammad al-Shawkānī, *Nayl al-Awtār* (Cairo : 1347), 7: 70.

[53]Cf. Muḥammad al-Bahī, *al-Dīn wa al-Dawlah: Min Tawjīhāt al-Qur'ān al-Karīm* (Beirut: Dār al-Fikr, 1391/1971), 394.

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doubled the penalty or claimed more than one life in retaliation. They were also wont to demand exaggerated sums as *diyah* (blood money) and held the whole tribe responsible for the crime of one of its members.[54] A well-known exception to this principle is the case of *'āqilah* (kinsmen) which is a pre-Islamic Arabian custom that was subsequently taken over on the grounds of *Sunnah* and consensus (*ijmā'*), and it required the kinsmen of the offender to pay the blood money in unintentional homicide. According to al-Awzā'ī (d. 157/774) and Dāwūd al-Ẓāhirī (d. 270/884) the offender himself does not participate with his *'āqilah* in the payment of *diyah*. According to Abū Ḥanīfah and Mālik, however, he does participate in the payment of *diyah* whereas, according to al-Shāfi'ī, he participates only if the *'āqilah* is unable to pay the *diyah*. We learn that during the time of 'Umar ibn al-Khaṭṭāb, the *'āqilah* also included colleagues at work (*ahl al-dīwān*).[55] This has led Maḥmūd Shaltūt to the observation that the proper purpose of *'āqilah* is to foster cooperation and mutual help in bearing the consequences of an unintended crime. It is, however, not meant to transfer the responsibility of the offender to another person, which is why the *'āqilah* is not required to participate in the *diyah* of a deliberate crime.[56]

Muslim jurists have formulated a number of legal maxims which complement the principle of legality in the *Sharī'ah*. One of these provides that "the conduct of reasonable men (or the dictate of reason) alone is of no consequence without the support of a legal text". This obviously means that no conduct can be declared forbidden (*ḥarām*) on grounds of reason alone or on grounds of the act of reasonable men alone, and that a legal text is necessary to render the conduct in question an offence. No one, therefore, should be deemed a violator because of committing or omitting an act which is not forbidden by the clear provisions of the law.[57] The substance of this principle is also upheld in another legal maxim which declares that "permissibility is the original norm" (*al-aṣl fī'l-ashyā' al-ibāḥah*).[58] The majority of *'ulamā'* have thus reached the conclusion that all things are permissible unless the law has declared them otherwise. Consequently, no one may be accused of an offence in the absence of a legal text. The third legal maxim under discussion provides that "no one bears any obligation unless he is capable of understanding the law which imposes it; nor may any one be required to act in a certain manner unless he is capable of knowing the nature of the act he is required to do or

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[54]Maḥmūd Shaltūt, *al-Islām*, 327.

[55]Abū Muḥammad 'Alī ibn Ḥazm al-Andalūsī, *al-Muḥallā*, ed. Aḥmad Muḥammad Shākir (Cairo: Dār al-Fikr, n.d.), 2: 55.

[56]Maḥmūd Shaltūt, *al-Islām*, 327.

[57]'Abd al-Qādir 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī* (Beirut: Dār al-Fikr, 1403/1983), 1: 115. The Arabic version of the maxim reads: *lā ḥukm li af'āl al-'uqalā' qabl wurūd al-naṣṣ*.

[58]Abū Ḥāmid Muḥammad al-Ghazālī, *al-Mustasfā min 'Ilm al-'Uṣūl* (Cairo: al-Maktabah al-Tijāriyyah, n.d.), 1: 63; Sayf al-Dīn Al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām* (Beirut: al-Maktab al-Islāmī, 1402/1982), 1: 130.

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avoid doing".[59] This principle indicates that the law which creates an obligation, or an offence, can only be addressed to a competent person who is capable of understanding it, and that it is physically possible for him to comply with the law when he knows of it. In order to make the knowledge of the law possible for the citizens, the legal text must be published and made accessible to all. Consequently no crime is committed until the text which creates it has been publicly announced and brought to the knowledge of the people.[60] These conclusions are supported by several passages in the Qur'ān. To quote just a few:

> We do not punish until we have sent a messenger (to give warning). (*al-Isrā'* 17: 15)
>
> Nor was thy Lord the one to destroy a population until He had sent in its midst a messenger rehearsing to them Our signs. (*al-Qaṣaṣ* 28: 59)
>
> (All these) Messengers gave good news as well as warning so that people should have no plea against God after the (sending of Messengers). God is All-Powerful, All-Wise. (*al-Nisā'* 4: 165)

People are thus accountable for their deeds in consideration of the message and the scripture conveyed to them. The principle contained in these Qur'ānic passages is that without prior warning, scripture and guidance, there shall be no punishment. Thus, according to 'Awdah: "In the absence of a clear text which may require affirmative action or abandonment of a particular conduct, the perpetrator or abandoner incurs no responsibility and no punishment can be imposed".[61] Anyone who looks into the *Sharī'ah*, 'Awdah added, will find that there is a clear text for every punishable offence, although the approach may differ with regard to the types of offences, as we shall presently explain.[62] Commenting on the same Qur'ānic passages, Khallāf wrote: "This is the majority position: that a person who has lived in complete isolation so that no message, law or guidance has been communicated to him is *non-compos mentis* (*ghayr mukallaf*). Such a person could not, therefore, be rewarded for his good deeds nor could he be punished for his evil conduct and crime. For it is a pre-requisite of responsibility (*taklīf*) that the law is communicated to its proper audience".[63]

There is evidence in the Qur'ān to the effect that punishment must not be applied retroactively:

> Say to the unbelievers that if they desist (from unbelief), what they have done in the past would be forgiven. (*al-Anfāl* 8: 32)

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[59]'Abd al-Wahhāb Khallāf, *'Ilm Uṣūl al-Fiqh* (Kuwait: Dār al-Qalam, 11398/1978), 173.
[60]Cf. 'Awdah, *Tashrī'*, 1: 117.
[61]Ibid., 1: 115.
[62]Ibid., 1: 133.
[63]Khallāf, *'Ilm Uṣūl al-Fiqh*, 98.

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It is provided elsewhere in the Qur'ān with reference to pre-Islamic marital practices:

> And marry not those women whom your fathers married except for what had already happened in the past. (*al-Nisā'* 4: 22)

Abū Zahrah draws the conclusion from these verses that the Qur'ān forbids applying the penal law of Islam for offences that were committed prior to the advent of Prophet (peace be on him). This would, in principle, establish the non-retroactivity of penalties under the *Sharī'ah*.[64] The substance of these versus is once again confirmed in the following *ḥadīth*: When 'Amr b. al-'Āṣ embraced Islam, he pledged allegiance to the Prophet (peace be on him) and asked if he would be held accountable for his previous transgressions. To this the Prophet (peace be on him) replied:

> Did you not know, O 'Amr, that Islam obliterates that which took place before it.[65]

The Prophet (peace be on him) also did not question Abū Sufyān and his wife for their previous conduct, nor did he question the man who had killed his uncle Ḥamzah even though his death had caused him deep sorrow. The only exception to this principle to be noted is that the new law has a retroactive effect when it is in favour of the accused.[66]

The *Sharī'ah* does not advocate a rigid approach in its implementation of the principle of the rule of law. Broadly speaking, the *Sharī'ah* employs three different methods for implementing the principle of legality in criminal law. In the case of serious crimes which pose a major threat to society, the *Sharī'ah* specifies both the offence and the punishment. The punishment so specified may fall under the *ḥudūd*, just retaliation (*qiṣās*) and blood-money (*diyah*). For offences which pose a relatively lesser threat to public safety, the *Sharī'ah* does not specify the penalty but defines the offence and provides only general guidelines about the punishment. These are the *ta'zīr* offences where the *Sharī'ah* specifies the conduct but empowers the judge to select the type and amount of its punishment, which he deems most suitable, out of a range of approved penalties. *Ta'zīr* offences relate primarily to acts which the *Sharī'ah* has defined as transgression (*ma'ṣiyah*). It is not for the judge to define the offence; he can only specify punishment for a certain conduct the criminality of which has already been determined by a legal text (*naṣṣ*).

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[64]Abū Zahrah, *al-Jarīmah wa'l-'Uqūbah fi'l-Fiqh al-Islāmī* (Cairo: Dār al-Fikr, n.d.), 185.

[65]Muslim, *Ṣaḥīḥ Muslim*, Kitāb al-Īmān, Bāb al-Islām yahdim mā qabluh wa kadhā al-Hijrah wa al-Ḥajj; Abū Zahrah, *al-Jarīmah*, 343.

[66]Ibid., 323; al-Ṣāleḥ, "The Right of the Individual to Personal Security", in Bassiouni, *Islamic Criminal Justice*, 63.

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While discussing the common misconception that the judge has a free hand in dealing with *ta'zīr* offences, 'Abd al-Qādir 'Awdah points out that the *Sharī'ah* imposes certain restrictions on the powers of the judge. It is, consequently, a mistake to say that *ta'zīr* offences are not regulated by the *naṣṣ* or to suggest that the judge is at liberty to determine both the crime and its punishment. The judge must, first of all, determine whether the conduct is a *ma'ṣiyah* according to the clear texts of the *Sharī'ah*. The offence must then be proved through the legally required evidence. The judge selects only that type of punishment which the *Sharī'ah* has validated. 'Awdah goes on to illustrate the foregoing by referring to a number of *ta'zīr* offences and the textual bases on which they rest. The list includes consumption of forbidden substances, breach of trust, cheating in weights and measures, perjury, usury, obscenity and insult, bribery, unlawful entry into private dwellings, and espionage. In all of these the Qur'ān and the *Sunnah* provide the textual authority which renders the conduct into a *ma'ṣiyah*. While meting out punishment for any of these offences, the judge must select an approved penalty, ranging from a mere warning to fines and imprisonment, and decide whether the sentence may be suspended or be carried out promptly. The judge, in other words, enjoys discretionary powers in regard to *ta'zīr* offences which 'Awdah characterises as *sulṭat al-ikhtiyār* (power to select) as opposed to *sulṭat al-taḥakkum* (power to legislate at will). According to the Islamic constitutional theory, neither the judge nor any other organ of government enjoys unlimited powers of this latter type.[67]

In regard to *ta'zīr* offences which violate the public interest (*al-maṣlaḥah al-'āmmah*), the *Sharī'ah* does not specify the nature of the offence but provides only general guidelines on the type of conduct that is deemed to be harmful to society, the reason being that offences of this type are, on the whole, unpredictable and cannot be specified in advance. An act may be permissible and yet the circumstances in which it is committed, or some of its attributes are such that they would violate public interest. While in principle the *Sharī'ah* penalises only those acts which amount to transgression, it makes an exception by authorising the judge to penalise the conduct which, though not forbidden by textual authority, and therefore not a *ma'ṣiyah*, is prejudicial to public interest and causes harm (*ḍarar*) to society.[68] Examples of this kind of *ta'zīr* are restrictions on the liberty of the insane for the sake of public safety and preventing him from harming the community, or detention without proof of an accused on grounds of public interest, that is, to facilitate investigation and prevent a possible escape of the accused.[69]

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[67]Ibid., 60.

[68]Abū Zahrah, *al-Jarīmah*, 209.

[69]Al-Māwardī explains that some jurists, like Abū 'Abd Allāh al-Zubayrī al-Shāfi'ī, have stated a maximum limit of one month of detention for purposes of investigation. Others have suggested different time limits, but the best view is that the *Imām* may specify the limit as he

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In all of this, whether *ta'zīr* contemplates a *ma'ṣiyah* (transgression) or *ḍarar* (harm), the punishment must be proportionate to the offence and should remain within the limits of moderation. Based on the authority of the *Sunnah*, Muslim jurists have further added the proviso that *ta'zīr*, in general, must operate at a level below the severity of the prescribed penalties (*ḥudūd*).[70] *Ta'zīr* punishment may also be invoked in the case of prescribed *ḥadd* offences where the specified punishment cannot be enforced due to insufficiency of evidence, or owing to doubt in the fulfilment of their necessary conditions. In both cases, the judge has powers to impose, by way of *ta'zīr*, a lesser punishment as may be considered appropriate.

There is some disagreement among the leading *madhāhib* as to the quantitative limits of *ta'zīr* penalties. While some jurists, especially those of the Mālikī school, have specified no limits and have referred the matter to considerations of *maṣlaḥah* and *ijtihād* of the judge; others have held that *ta'zīr* penalties in each category must be below the level of the relevant *ḥadd* punishment. This is the view of some Shāfi'ī and Ḥanbalī jurists. According to another view, which is upheld by many Ḥanafī, Shāfi'ī and Ḥanbalī scholars, *ta'zīr* must not exceed the lowest of all the *ḥadd* penalties across the board, which means that it may not exceed forty lashes of the whip. The fourth opinion on this, which is held by some Ḥanbalī *'ulamā'*, is that *ta'zīr* punishment may not exceed ten lashes of the whip absolutely, and there is some authority in the *Ḥadīth* in support of this. Having said this, however, *ta'zīr* punishments may also consist of a mere verbal reprimand, imprisonment, and according to some, also of banishment, depending on the nature of the offence, the conditions of the offender and considerations of public interest *(maṣlaḥah)*.[71]

I now proceed to present an analysis of the two allied concepts: *tuhmah* and *ẓann*.

IV

ACCUSATION (*TUHMAH*) AND SUSPICION (*ẒANN*)

Definition and Meaning

Accusation (*tuhmah*) may be defined as "an unproven attribution of crime to someone which is accompanied by a demand for judicial redress". In this definition accusation is an unproven claim and it is this factor that distinguishes accusation from indictment and sentence, which are accompanied by proof. The demand for judicial redress in this definition also distinguishes accusation from a casual attribution of criminal behaviour to someone, which is not intended

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deems fit. See Māwardī, *al-Aḥkām*, 192; 'Awdah, *al-Tashri'*, 1: 150.

[70]Abū Zahrah, *al-Jarīmah*, 208; 'Awdah, *al-Tashrī'*, 308.

[71]See for details Ibn al-Qayyim, *al-Ṭuruq*, 124; see also Māwardī, *al-Aḥkām*, 205.

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to involve indictment and adjudication. Accusation is often made by the victim of the crime or by an interested party, but it may, in principle, be by anyone, including members of the public and the police. It is also necessary that the subject of accusation is a crime or a violation which renders its perpetrator liable to punishment.[72]

Evidence in the Qur'ān and Sunnah

Accusing someone of a crime without proof necessarily partakes in suspicion (*ẓann*), which is generally not encouraged. The principle here is laid down in the Qur'ānic address to the believers to:

> Avoid indulgence in suspicion, for suspicion in some cases is a sin; and spy not on one another. (*al-Ḥujurāt* 49:12)

In the *Sunnah* this Qur'ānic directive has been reiterated and the believers have been warned to:

> Beware of suspicion, for suspicion is the worst form of lying; and do not spy.[73]

Commentators of the Qur'ān have equated suspicion here with accusation. What is prohibited, as al-Qurṭubī has noted, is baseless accusation such as accusing someone of adultery and drunkenness without evidence. To say that suspicion here means accusation is also borne out by the subsequent phrase both in the Qur'ān and in the *ḥadīth*: "... and spy not". For it may occur to someone initially to accuse a person of some wrongdoing so as to spy on him afterwards.[74]

Sayyid Quṭb (d. 1966), the well-known Islamic scholar and commentator of the Qur'ān, has drawn the conclusion from the verse quoted above that arrest on the basis of a mere suspicion is a violation of the personal rights of the individual. No one may be arrested for anything other than an offence which is apparent and no one may be pursued in hidden ways or spied upon in order to be incriminated. The suspect may only be arrested and convicted for a crime that can be proved against him or her by means of lawful evidence which must preclude espionage. In support of this conclusion Sayyid Quṭb has quoted a *ḥadīth* on the authority of Mujāhid in which the Prophet (peace be on him) is reported to have instructed the believers to:

> Avoid spying. You may accuse people for what is apparent, but leave alone that which God has concealed.[75]

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[72]Cf. Ibn al-Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, 93-94. Fahd al-Suwaylim, *al-Muttaham*, 23.

[73]Bukhārī, *Ṣaḥīḥ al-Bukhārī*, 8: 58 *ḥadīth* no. 90; Muslim, *Ṣaḥīḥ Muslim*, Kitāb al-Birr wa al-Ṣilah, Bāb al-Nahy 'an al-Tajassus.

[74]Cf. Abū 'Abd Allāh Muḥammad al-Anṣārī al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān* (Cairo: Dār al-Kitāb al-'Arabī, 1387/1967), 16: 331.

[75]Sayyid Quṭb, *Fī Ẓilāl al-Qur'ān* (Beirut: Dār al-Shurūq, n.d.), 6: 3346.

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The renowned Companion, 'Abd Allāh ibn Mas'ūd, is also reported to have said that "espionage is forbidden for us. We may only incriminate people for what is apparent".[76] Commenting on the same verse, Ṭāhā Jābir al-'Alwānī has observed that no one may be subjected to frisking or search of his/her person or home, and there must be no surveillance, nor recording of conversations over the telephone or elsewhere, nor invasion of privacy in any other manner on the basis merely of a dubious suspicion that he or she might have committed a crime. This is because "unfounded suspicion is the worst possible kind of suspicion, and one who acts on such suspicion is a wrongdoer".[77] This is also the conclusion that both al-Awad and al-Ṣāleḥ have drawn from their combined reading of the above mentioned verse and two other Qur'ānic verses (*al-Nūr* 24: 27–28) on the privacy of the home. Searching and eavesdropping of persons, personal correspondence and property are therefore unlawful as they partake in espionage and violate the personal right to privacy.[78]

Muhammad Asad observes concerning the same verse that the Qur'ānic principles, when read together with the relevant *aḥadīth* on the subject of suspicion and espionage, call for a constitutional enactment that would prohibit the government from indulging in activities that compromise the inviolability of the citizen's personal dignity and right to safety. To subject the citizens, other than those previously convicted of felony and crime, to secret police supervision "would be entirely out of tune with the *modus operandi* of a truly Islamic state. Arrest on mere suspicion also would be a breach of constitutional law". Asad adds that imprisonment or internment without previous trial and conviction by a duly established court of law would clearly "contravene the principle of the inviolability of the human person laid down so unequivocally in the Qur'ān and *Sunnah*".[79]

It is further suggested that the Qur'ānic verse quoted above alludes to two types of suspicion, one of which is permissible (*al-ẓann al-mubāḥ*) and the other blameworthy (*al-ẓann al-sū'*) or reprehensible suspicion (*al-ẓann al-madhmūm*) and according to some, forbidden suspicion (*al-ẓann al-muḥarram*). When suspicion is based on the conviction that is supported by clues and circumstances which may be said to be reasonable, it is permissible, even praiseworthy; but when it lacks any such basis, then it is blameworthy and forbidden. This binary division of suspicion is indicated in the verse itself which evidently does not forbid suspicion altogether. Thus it is concluded that suspicion under circumstances that gives rise to reasonable doubt is permissible and may form the basis of appropriate action. The grounds of suspicion may

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[76]Ibid., 6: 3343; Al-Sha'rānī, *Kitāb al-Mīzān*, 166.

[77]Ṭāhā Jābir Al-'Alwānī, "The Rights of the Accused in Islam", *AJISS*, 2 (1994), 363.

[78]Awād, "The Right of the Accused Under Islamic Criminal Procedure", in Bassiouni, *Islamic Criminal Justice*, 104; al-Ṣāleḥ in, Bassiouni, *Islamic Criminal Justice*, 68.

[79]Muhammad Asad, *Principles of State and Government in Islām* (Barkeley: University of California Press, 1966), 85–86.

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either be related to the attending circumstances, or to the character and reputation of the individual, or to both. A suspicion (*al-ẓann*) that is supported by these factors differs from a mere doubt (*al-shakk*) in that unlike doubt which is not inclined to either side, suspicion is inclined toward the side which is supported by the attending clues.[80]

Types of Accusation *(tuhmah)*

Accusation may be private (*fardī*) or public (*'āmm*). Private accusation is made by the victim of the crime or his representative, and it usually involves litigation between the parties involved. When, for example, the victim of theft accuses a person of having stolen his personal property, the claim itself is seen as a ground for suspicion that may form the basis of arrest. Public accusation, on the other hand, is a right of the society at large which may be exercised by any of its members. Public accusation by a fellow citizen who is not a party to the offence partakes in *ḥisbah*, that is, commanding good and forbidding evil, which is normally resorted to by one who claims to have been a witness to the offence.

This type of accusation gives rise to the fear, on a wider scale, than the private accusation, of abusive action whereby individuals may accuse one another on insufficient grounds, or out of malice. The fear therefore that the reputation of innocent individuals may be impaired without due cause and that such individuals may, as a result, be subjected to undue pressure, is more prominent in this type of accusation. There is also the additional concern that public accusations, if left unchecked, might strain the time and resources of law enforcement agencies. The public is, on the one hand, encouraged to be alert to criminality and evil, yet safeguards are often necessary in order to avoid causing harm and suffering to innocent individuals. Whereas the private accuser is generally required to support his accusation by some form of evidence, the public accuser is not faced with a similar requirement. For he or she is a carrier of *ḥisbah* and his or her position is analogous to a witness. A witness is normally not required to support his statement by evidence. Public accusation is, however, not treated as a testimony against the accused person. This is because the judge needs to verify the probity (*'adālah*) of the witness, which he is not in a position to do in a public accusation, and until this has actually taken place, the allegation is not given the same weight as that of a private accusation. Public accusation is therefore treated as a weak form of accusation which carries less weight than the testimony of witnesses.[81]

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[80]Cf. al-Qurṭubī, *Aḥkām al-Qur'ān*, 16:331-332; Shams al-Dīn Muḥammad ibn 'Arafah al-Dusūqī, *Ḥāshiyat al-Dusūqī 'alā'l-Sharḥ al-Kabīr* (Cairo: 'Isā al-Bābī al-Ḥalabī, n.d.) 4: 144; Ḥusnī al-Jundī, *Ḍamānat Ḥurmat al-Ḥayāh al-Khāṣṣah fi'l-Islām* (Cairo: Dār al-Nahḍah al-'Arabiyyah, 1413/1993), 185-186.

[81]'Alā al-Dīn al-Kāsānī, *Badā'i' al-Ṣanā'i' fi Tartīb al-Sharā'i'* (Beirut: Dār al-Kitāb al-'Arabī, 1402/1982), 4: 277; al-Sharbīnī, *Mughnī 'l-Muḥtāj*, 4: 437.

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From the viewpoint of its validity or otherwise accusation is once again divided into the two types: valid accusation (*al-tuhmah al-ṣaḥīḥah*) and void accusation (*al-tuhmah al-fāsidah*).

Valid accusation is a credible accusation that is granted a hearing by the judge. Accusation is valid when it fulfils the following three conditions. Firstly, it must be well-defined and specific as it is addressed to a particular person and solicits adjudication, which is not possible unless the subject matter and persons involved therein are clearly identified. An example of unclear accusation would be when someone accuses another of theft in which the stolen goods are not identified, or when the accuser mentions a name and simply says: "I accuse so and so" without mentioning what that person might have done that he or she is accused of.[82]

Secondly, a valid accusation is one which is susceptible to proof and must be free of inconsistency and contradiction. Accusation is thus not credible in regard to a murder where the victim's body is not found, nor is it credible when the accuser accuses two persons saying in each case that: "This person alone has murdered my father", or when a man known for poverty claims that so and so had stolen a huge sum of money from him.

Thirdly, that the end result of accusation is feasible and the accusation, when proved, can lead to indictment and sentencing; it is, in other words, not an exercise in futility. An example of an unfeasible accusation would be to accuse someone of stealing his own property, or when it is too trivial, such as accusing someone of stealing "a grain of wheat".[83]

Void accusation is one which is devoid of credibility and does not warrant attention. It is an accusation which fails to fulfil one or more of the requirements of a valid accusation as discussed above.

Without wishing to enter into minutiae, Muslim jurists have also subdivided valid accusation into three types, namely, strong, weak and average.

A strong accusation (*al-tuhmah al-qawiyyah*) is one which is supported by apparent circumstances, such as accusing someone of theft who is known for having committed similar offences in the past. A weak accusation (*al-tuhmah al-ḍa'īfah*) is, on the other hand, one that is not supported by circumstances, and an example of this would be to accuse an upright person of good reputation with theft. Average accusation (*al-tuhmah al-mutawassiṭah*) is one in which neither of the two sides of the claim can be given preference over the other such as accusing someone of theft who is obscure and no information is available concerning his past behaviour.[84]

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[82]Dusūqī, *Ḥāshiyat al-Dusūqī*, 14: 144; Sharbīnī, *Mughnī 'l-Muḥtāj*, 4: 464.

[83]Ibn 'Ābidīn, *Hāshiyat Radd al-Muḥtār 'alā al-Durr al-Mukhtār* (Cairo: Dār al-Fikr, 1399/1979), 5: 544; al-Qarāfī, *al-Furūq*, 4: 72; Ibn Farḥūn, *Tabṣirah al-Ḥukkām*, 1: 148; Muḥammad Ibn Aḥmad al-Gharnāṭī ibn Juzayy, *Qawānīn al-Aḥkām al-Shar'iyyah* (Beirut: Dār al-'Ilm li'l-Malāyīn, 1979), 304.

[84]Ibn Farḥūn, *Tabṣirah*, 2: 145; Māwardī, *al-Aḥkām*, 219.

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V

ARREST AND DETENTION

In an attempt to specify the powers of the law enforcement authorities with regard to arrest and detention, Muslim jurists have discussed two sets of criteria, one of which refers to the character of the accused, and the other to the objective bases of suspicion. With reference to the former, the accused may fall under any of the following three categories:

Firstly, he or she is not known for criminality and corruption; there is no criminal record and the person evidently does not belong to what is phrased in Arabic as *ahl al-tuhmah* (the deviant type). The jurists are in agreement that this type of accused may neither be arrested nor detained on the basis of a mere suspicion. It is added that this is precisely the type of suspicion which the Qur'ān has proscribed and declared to be sinful. A mere suspicion in this case is not enough to warrant arrest unless it is accompanied by credible evidence. There is disagreement, however, as to whether the accuser himself may be liable to punishment, and the dominant of the two variant views on this validates a deterrent punishment for the accuser. This is necessary in order to prevent miscreants from soiling the good name of upright and innocent individuals by launching hostile and malicious claims against them. Mālik is of the view that the accuser should not be punished unless it can be proved that he had acted out of malice in order to harm the accused. The judge should not pay any heed to such claims and should not even grant the claimant the opportunity to take an oath to fortify his claim. The Mālikī and the majority rulings on this issue pursue the same objective, which is to deter attack on the good name and reputation of upright individuals.[85]

Secondly, when the accused person is obscure and has no reputation either for piety or deviation: such an accused may be arrested and detained, according to the majority ruling for the purpose of investigation. Mālik is also in agreement with the majority on this point and the ruling here is founded on a *ḥadīth* in which Abū Hurayrah has reported that "the Prophet has detained the accused for a day and a night", apparently for the purpose of investigation.[86] While quoting this *ḥadīth*, Ibn al-Qayyim wrote that "the agreed upon principle among the leading *Imāms* support this position". For they agree, Ibn al-Qayyim adds, that the judge is under duty to summon the defendant when there is a claim against him in order to adjudicate between them. But then if the accused has travelled a distance and it is not possible to adjudicate the case on the same day, the judge would have little choice but to detain the accused. This is valid,

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[85]Ibn Farḥūn, *Tabṣirah*, 2: 156; Taqī al-Dīn Ibn Taymiyyah, *Majmū' Fatāwā Ibn Taymiyyah*, ed. 'Abd al-Raḥmān ibn Qasīm (Beirut: Mu'assasat al-Risālah, 1398 A.H.), 34: 236; Ibn al-Qayyim, *al-Ṭuruq*, 101; al-Jundī, *Damānat*, 182.

[86]Abū 'Abd Allāh al-Ḥākim al-Nīshābūrī, *al-Mustadrak 'alā 'l-Ṣaḥīḥayn*, ed. Yūsuf 'Abd al-Raḥmān al-Mar'ashlī (Beirut: Dār al-Ma'rifah, n.d.), 4: 102; Ibn al-Qayyim, *al-Ṭuruq*, 102.

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Ibn al-Qayyim adds, not only in criminal litigations but also in financial disputes. Ibn al-Qayyim further adds that detention does not necessarily mean imprisonment in a confined space. It means restricting a person's freedom of movement and that may be done at any place, including his own house. The judge may also assign a person to watch over the accused and follow his movements, or take a surety from him.

To limit the initial period of preventive detention to 24 hours, on the basis of the *ḥadīth* mentioned above, seems to be the preferred position to begin with. Some jurists have recorded the view that this may be extended to two days, and then to three days. But then there is disagreement as to the maximum duration of preventive custody. There are basically two opinions on this, one of which, held mainly by the Shāfi'īs, has determined it to be one month. If by this time the facts are still not known, the accused should be released forthwith. The second view on this leaves the matter to the discretion and *ijtihād* of the head of the state and his representatives, with the recommendation that the detention should not be lengthy and be terminated whenever possible without delay.[87] Māwardī explains that some jurists like Abū 'Abd Allāh al-Zubayrī al-Shāfi'ī (d. 317/929) have stated a maximum limit of one month of detention for purposes of investigation. Others have suggested different time limits, "but the best view is that the head of the state (*Imām*) may specify the limit as he deems fit".[88] This latter view would bring the issue under the umbrella of *siyāsah shar'iyyah*, a subject which I have discussed elsewhere.[89] Suffice it here to note that *siyāsah shar'iyyah* itself may be regulated by means of statutory legislation and it would, in principle, be valid for the head of the state (*Imām*) to impose statutory limitations on preventive detention.

Thirdly, when the accused is known for wrongdoing and the accusation against him appears consistent with his reputation and record, the majority of jurists have in this case validated preventive detention for purposes of investigation. According to one view, the accused may be detained for a longer period than one month, if the charge against him gains further ground, but he may neither be beaten nor pressurized. The preferred view is that the matter should be determined by the authorities who should mainly consider the strength or weakness of the accusation and may detain the accused for a longer period than the accused whose condition is unknown.[90] The detention here is basically aimed at facilitating investigation and it is not meant to either punish or intimidate the accused. It seems that beating such a person is permitted

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[87]Māwardī, *al-Aḥkām*, 152; Ibn al-Qayyim, *al-Ṭuruq*, 103; Ibn 'Ābidīn, *Ḥāshiyah*, 4: 188; Abū'l Walīd Sulaymān ibn Khalaf al-Bājī, *al-Muntaqā Sharḥ al-Muwaṭṭa'* (Cairo: Maṭb'a al-Sa'ādah, 1332 A.H.), 7: 166.

[88]Māwardī, *al-Aḥkām*, 150.

[89]Muhammad Hashim Kamali, "*Siyāsah Shar'iyyah* or the Policies of Islamic Government", *AJISS*, 6 (1989), 59–81.

[90]Ibn Farḥūn, *Tabṣirah*, 2: 158; al-Bāji, *al-Muntaqā*, 7: 166; Zayn al-'Ābidīn ibn Nujaym al-Zayla'ī, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq* (Beirut: Dār al-Ma'rifah, n.d.), 5: 46.

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although the *'ulamā'* have recorded different views on this as I shall elaborate. A mere denial, even under oath, by the accused of the charges laid against him, is not enough to warrant his release, and it is essential that the truth or falsehood of the accusation is established through evidence. The ruler and judge may consequently detain him for the duration of the investigation. Those who have validated beating – and this includes Mālikī and Ḥanbalī jurists – maintain that beating should be by the whip. The length of detention is not specified according to the preferred view, although some *'ulamā'* have held, as noted above, that detention for investigation may not exceed one month.[91] In response to the question as to whether the judge or the head of the state (*Imām*) or both have discretion to order detention for the purpose of investigation, the jurists disagree on the point but the preferred view is that the order may be issued by either.[92]

The second of the two sets of criteria under discussion refers to the nature of the activity itself and the visible aspects of suspicious conduct that prompts the arrest and detention of a suspect. The proponents of this view proceed on the assumption that knowledge of the personal character of individuals is often not available to law enforcement authorities, and it is therefore preferable that the decision whether or not to detain a person should be based on objective factors, which must concern the infraction of law and morality or suspicious conduct itself. Thus a person may not be arrested on mere suspicion which is not substantiated by circumstantial evidence and clues (*al-adillah wa al-qarā'in*). Suspicion alone should not be mistaken for evidence, for it is neither evidence, nor a *qarīnah*; and if an arrest were to be based on it, there must be something more than a mere doubt (*al-shakk*) which turns it into a permissible suspicion (*al-ẓann al-mubāh*). An example of unfounded suspicion would be to arrest someone on suspicion of burglary without there being any clue to support that suspicion. This is the impermissible, or malicious suspicion (*al-ẓann al-sū'*) which the Qur'ān has proscribed (*al-Ḥujurāt* 49: 12) and it violates the individual's right to personal safety. The Prophet (peace be on him) has equated this kind of suspicion with the worst kind of lie (*akdhab al-ḥadīth*) as it has no basis in reality and originates in malice.[93]

In their attempt to distinguish the permissible suspicion (*al-ẓann al-mubāh*) from the reprehensible suspicion (*al-ẓann al-madhmūm*) or blameworthy suspicion (*al-ẓann al-sū'*) the majority of *'ulamā'* prefer to combine the two criteria (i.e. the subjective and the objective) into a single formula. It is accordingly held that suspicion is forbidden in regard to individuals who have no reputation of wrongdoing and who are, by all appearance, upright, and there is also no objective basis, nor an apparent motive or circumstance for suspicion.

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[91]Ibn al-Qayyim, *al-Ṭuruq*, 104-105; al-'Īlī, *Ḥurriyyāt*, 369.
[92]Māwardī, *al-Aḥkām*, 220; Ibn al-Qayyim, *al-Ṭuruq*, 104; Ibn 'Ābidīn, *Ḥāshiyah*, 4: 15.
[93]Al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān*, 7: 6152; al-Jundī, *Ḍamānat*, 185–186.

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Is Preventive Detention Permissible?

Since accusation is an unproven claim, and preventive detention is a serious restraint on personal liberty, the question naturally arises whether it is at all justified to detain a person on the basis of a mere accusation. The other and equally persuasive side of this argument, as already indicated, is that it is often necessary to detain the accused for the purpose of investigation so as to prevent his possible escape. Muslim jurists have held three different views on this, one of which maintains that pre-trial detention is unlawful. The second view validates preventive detention only in crimes that invoke a prescribed *ḥadd*, or retaliatory punishment (*qiṣāṣ*). The third view, which is held by the majority of jurists, validates preventive detention.

The first view which is held by Ibn Ḥazm al-Ẓāhirī, and also by some Shāfi'ī and Ḥanbalī *'ulamā'*, proceeds from the original presumption of non-liability (*barā'at al-dhimmah al-aṣliyyah*) and maintains that the accused is not liable to anything prior to proof. Detaining the accused on the basis of accusation alone is tantamount to oppression and a violation of his right, which must be avoided. The proponents of this view have quoted in support the precedent of the Caliph 'Umar ibn al-Khaṭṭāb in a case in which 'Abd Allāh ibn Abī 'Āmir had his leather bag stolen while on a journey together with a group of others. One of the men in the group was suspected of the theft and was questioned for it but he denied the charge. Abū 'Āmir later reported the case to the Caliph who asked as to how many of them were travelling and the Caliph was informed of this. Abū 'Āmir then said: "O Commander of the Faithful! I had intended to bring the accused tied up before you". The Caliph expressed his anger at this and refused to take any action.[94] He evidently disapproved of the accused being tied up in fetters, which is equivalent to detention, when there was no evidence to support the accusation.

Abū Ḥanīfah's disciple, Abū Yūsuf, has also advanced a forceful argument to the effect that no one should be detained on the basis of a mere claim by another person. To quote Abū Yūsuf:

> It is not permissible to imprison a person because of the accusation of another person. The Prophet (peace be on him) did not arrest people on the basis of accusation only, but it is proper to bring the accuser and the defendant together. If the former produces positive evidence in support of his claim, the judgment will be issued in his favour, otherwise a surety will be taken from the defendant and he will be released. If the defendant subsequently clarifies something [it may be considered], otherwise he should not be pressurised. This should also apply to everyone who is detained on suspicion. The Companions of the Prophet (peace be on him) were cautious about imposing punishments [lest anyone harmed the innocent].[95]

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[94] Abū Bakr 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-A'ẓamī (Beirut: Dār al-Fikr al-Islāmi, 1392/1972), 1: 217; Ibn Ḥazm, *al-Muḥallā*, 2: 16.

[95] Abū Yūsuf, *al-Kharāj*, 2: 190-191.

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The second view on preventive detention is that of the majority of the Ḥanafīs and it validates preventive detention of the accused in the prescribed offences of *ḥudūd* and retaliation (*qiṣāṣ*), but not in pecuniary claims. This view is based on the opinion that imprisonment is the most that can possibly be ordered in pecuniary claims after the claim is proven, hence it would be excessive to impose that punishment prior to proof. But since the *ḥudūd* and *qiṣāṣ* offences involve punishment of greater severity than imprisonment, the latter may be imposed for the purpose of investigation.[96]

Thirdly, the majority view which validates preventive detention in all crimes, including financial crimes, is based on the analysis that setting the accused free during the investigation and trial is likely to lead to miscarriage of justice if he escapes, tries to influence the witnesses, or destroys incriminating evidence. The majority have also quoted a *ḥadīth* reported by Bahz ibn Ḥakīm (d. circa 60 A.H.) that: "the Prophet (peace be on him) detained a man under accusation".[97] According to yet another *ḥadīth* on the authority of a Successor, Azhar b. 'Abd Allāh ibn Jamī' al-Ḥarāzī (d. circa 128 A.H.), "a group of people brought a claim of theft against some weavers to a Companion called Nu'mān ibn Bahsīr, who detained the accused persons for a few days and then released them. The plaintiffs protested to Nu'mān that "you released them without beating them or testifying to their veracity", to which Nu'mān replied: "What would you have done? You might have beaten them and procured your goods, but if you punished them wrongfully, you would yourselves be liable to retaliation". The accusers then asked: "Is this your judgment"? Nu'mān replied: "This is the judgment of God and His Messenger".[98] The conclusion has thus been drawn that if detention were impermissible, Nu'mān would not have detained the accused persons nor would he have said that this was "the judgment of God and His Messenger".

The majority have also quoted another *ḥadīth* on the authority of Abū Hurayrah in this connection, a *ḥadīth* to the effect that on occasions "the Prophet (peace be on him) detained for a day and a night for investigation on precautionary grounds".[99] Quoted in support is also the Qur'ānic verse which validates a brief detention of witnesses in the case of the bequest made during a journey but whose testator had later died. The text thus provides:

> If you doubt their testimony, then detain them after the prayer, and let them swear by God (saying): 'We will not take for it a price though there be a relative nor will we hide the testimony' .... (*al-Mā'idah* 5: 106)

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[96]Al-Zayla'ī, *al-Baḥr al-Rā'iq*, 5: 6; Suwaylim, *al-Muttaham*, 92.

[97]Abū Dāwūd, *Sunan*, Kitāb al-Aqḍiyah, Bāb fī al-Ḥabs fī 'l-Dayn wa Ghayrihi, 3: 314; Ibn al-Qayyim, *al-Ṭuruq*, 102.

[98]Abū Dāwūd, *Sunan*, Kitāb al-Ḥudūd, Bāb fī 'l-Imtiḥān bi al-Ḍarb, *ḥadīth* no. 4382.

[99]Al-Ḥākim, *al-Mustadrak*, 4: 102; Ibn al-Qayyim, *al-Ṭuruq*, 102.

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The text thus permits temporary detention of witnesses that are suspected of perjury in order to verify the truth of their testimony. The detention here is evidently precautionary, not punitive, which is intended to prevent misappropriation of the property of a deceased person, and the text is therefore quoted to validate preventive detention for the purpose of investigation. "Detain them after the prayer" in the text quoted above evidently contemplates a brief detention, presumably until the next prayer time on the same day, which may well be within the perimeters of the mosque and may not even involve detention in the usual sense of the word.

As for the argument that detention violates the presumption of innocence, it is stated that the presumption remains intact and detention prior to proof is not a punitive but a precautionary measure which is justified to prevent escape especially in claims that are supported by credible clues (*al-qarā'in*).[100]

VI

THE ISSUE OF BEATING THE ACCUSED

Al-Shāṭibī writes that the *'ulamā'* are in disagreement about beating the accused. Those who validate preventive detention of the accused also validate beating him since both are punishments of one kind or the other and thus partake in the attributes of one another. Mālik has validated detention of the accused, and his followers also uphold the permissibility of beating. Shāṭibī himself tends to concur as he adds "for if beating and detention were not permitted, it would be difficult to retrieve the properties of the people from thieves and usurpers".[101] It is difficult to ascertain the majority position over this issue as some of the references made in *Fiqh* books to "majority ruling" or "predominant position" turn out to be somewhat doubtful. What seems certain is that many jurists have upheld beating during detention only of the accused who is a known criminal, and they are almost unanimous in saying that beating is not permissible when the accused is known to be a person of good reputation and integrity.

Disagreement prevails among the *'ulamā'* over the permissibility or otherwise of beating a person who is obscure and his past record cannot be verified. A number of early jurists, including Aṣbagh b. al-Faraj ibn Sa'īd (d. 225/840) Abū Muḥammad 'Alī b. Aḥmad b. Sa'īd ibn Ḥazm (d. 456/1064) and Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505/1111) proscribe beating during investigation altogether, including beating of the accused with a criminal

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[100]Māwardī, *al-Aḥkām*, 220; Ibn Farḥūn, *Tabṣirah*, 2: 329.

[101]Abū Isḥāq Ibrāhīm al-Shāṭibī, *al-I'tiṣām* (Beirut: Dār al-Ṭibā'ah li al-Nashr, 1402/1982), 2: 120.

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record.[102] Both the opponents and the proponents of beating have referred to evidence that consists of several reported *aḥādīth* and incidents that took place during the time of the Companions. The evidence remains to be somewhat interpretational and inconclusive. Some of this evidence has been quoted by both sides each drawing a totally different conclusion from it. In his recent work Fahd al-Suwaylim, a contemporary writer on the subject, has reviewed the detailed evidence and reached the conclusion, without specifying any particular type or class of accused persons, that beating is permissible provided that it is not excessive but is enough to pressurise the accused whose accusation is supported by circumstantial evidence, including his past record. Al-Suwaylim adds that this does not include inhumane methods of torture such as electric shocks, nail pulling and the like.[103] My own examination of the evidence leads me to the conclusion that passing an affirmative judgment on the permissibility of beating during interrogation can at best be sustained only with reference to dangerous criminals, but taking a general position of the kind that Suwaylim has taken is ultimately self-defeating and futile. To validate beating during interrogation is untenable simply because it fails to meet the basic requirements of the *Sharī'ah* that confession must be voluntary and free of duress. The accused may not, in other words, be forced to make a confession. He is entitled to remain silent and refuse to give self-incriminating evidence. The accused may also choose not to respond to questions. If he or she does respond and it is later determined that the answers were false, he or she may not be charged with, or punished for, giving false testimony. In the event where the accused confesses to a *ḥadd* offence, he or she may retract his or her statement and thereby nullify the confession. The accused may likewise not be pressurised to make a confession under the influence of hypnosis, truth serum or under of drugs.[104]

The main argument against the exercise of coercion in order to extract a confession is presented by Ghazālī, and although it is said to be a minority view,[105] it stands on a stronger foundation, and draws support from several *aḥadīth* which Ghazālī has quoted. First of all, there is the *ḥadīth* of the Farewell Pilgrimage in which the Prophet (peace be on him) declared, in his address to the believers:

> Everything that belongs to a Muslim – his blood, his property and his honour – is forbidden to his fellow Muslim.[106]

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[102]Ibn Taymiyyah, *Majmū' Fatawā*, 34: 238; see also Māwardī, *al-Aḥkām*, 220; Ibn al-Qayyim, *al-Ṭuruq*, 105; Ibn Farḥūn, *Tabṣirah*, 2: 154 & 158.

[103]Fahd al-Suwaylim, *al-Muttaham*, 116-117.

[104]Al-'Alwānī, "The Rights of the Accused", (part two), *AJISS* 2 (1994), 507.

[105]Fahd al-Suwaylim, *al-Muttaham*, 101–102.

[106]Bukhārī, *Saḥīḥ al-Bukhārī*, 7: 51, *ḥadīth* 776; Abū Ḥāmid Muhammad al-Ghazālī, *Shifā' al-Ghālīl*, ed. Ḥamd al-Kabīsī (Baghdad: Maṭba'at al-Irshād, 1390/1981), 229.

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"Everything that belongs to a Muslim" in the above-mentioned *ḥadīth* naturally includes his personal safety from beating and persecution which are forbidden, unless it be in the course of justice. The substance of this *ḥadīth* is confirmed by the *ḥadīth* of al-Nu'mān ibn Bashīr who released a group of persons that were accused of theft for lack of evidence. Had beating and torture been permissible, Nu'mān might have beaten the accused person in order to procure a confession. According to yet another *ḥadīth*, the Prophet (peace be on him) has said concerning a woman who had a reputation for debauchery and corruption:

> If I were to stone anyone without evidence, I would have stoned this woman.[107]

It is thus concluded that the Prophet (peace be on him) did not resort to punishment even concerning a person who was well known as a criminal.

'Abd Allāh ibn 'Abbās has reported an incident in which a slave woman complained to the Caliph 'Umar ibn al-Khaṭṭāb that her master accused her of adultery and forced her to sit on fire that resulted in injury to her private parts. The Caliph then asked her if the man had seen her doing what he accused her of, to which she is reported to have said: "No". She was then asked if she had confessed anything to which she also replied in the negative. The Caliph then asked the man the same questions: whether he had seen her committing adultery, and whether she had confessed to him anything in that regard. To both of these, the man replied in the negative. The Caliph then said: "By God, if I had not heard the Messenger of God say that the master is not subjected to *qiṣāṣ* in respect of his slave nor the father in respect of his son, I would have subjected you to *qiṣāṣ*". Then the Caliph flogged the man one hundred lashes and told the woman: "You are now free from his bondage".[108]

The conclusion has thus been drawn that the Caliph 'Umar was so incensed that he punished the man for the torture that he inflicted on the woman merely on the basis of suspicion and unproven accusation.

Ghazālī has gone so far as to say that beating is prohibited even in accusations involving hardened criminals. A mere reputation or past record of criminality is not enough to warrant beating the accused before trial. If the accused had committed a crime in the past and was punished for it, then punishing him again on that same basis is oppressive. To say that one accusation is proven by a previous incident is equally imaginary and unjustified. The life and right to safety of every individual are to be honoured and departure from this position is warranted only on the basis of proof of criminality.

As for the relevance of *maṣlaḥah* to the issue of pre-trial beating, Ghazālī has observed that punishing the accused on the basis of a supposed benefit

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[107]Bukhārī, *Ṣaḥīḥ al-Bukhārī*, 8: 559, *ḥadīth* 839; Ibn Taymiyyah, *al-Siyāsah*, 153.
[108]Ḥākim, *al-Mustadrak*, 2: 216; Bayhaqī, *al-Sunan*, 8: 36.

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(*maṣlaḥah*) of the community in the name of crime prevention is tantamount to overruling certainty on the basis of a mere doubt. The certainty here is the right to safety of the accused person and what is in doubt is the supposed benefit (*maṣlaḥah*) of the community. Ghazālī has thus reached the conclusion that *maṣlaḥah* is not the right context by which to determine this issue. For there are opposing interests involved, one of which is the interest of the accuser, and the society at large, and the other of the accused. The former is in need of proof whereas the latter is not; the latter should therefore take priority, not *vice versa*. This is the view, as already noted, of Ibn Ḥazm al-Ẓāhirī and of one of the early Mālikī jurists, Aṣbagh, who have considered beating the accused totally impermissible.[109] The proponents of this view have added that there is no report of any incident where the Companions might have beaten or tortured the accused.

Ghazālī also wrote that beating the accused forces him to make a confession and confession under duress is of no value.[110] A reference is here made to the *ḥadīth* in which the Prophet (peace be on him) proclaimed:

> God has forgiven my community for what they do by mistake, forgetfulness, and under compulsion.[111]

There is general agreement on the principle that confession obtained under duress is null and void. Mālik has said concerning confession to a crime obtained "after a threat, a promise, imposition of restriction on one's movement, beating or imprisonment is invalid and fails to provide a basis for punishment".[112] The Ḥanafī jurist, al-Sarakhsī, also wrote that "when the judge compels a man by threatening him, or beating him, or subjecting him to restriction or imprisonment to incriminate himself in respect of a case of prescribed offence (*ḥadd*) or retaliation (*qiṣās*), the confession is null and void". Al-Sarakhsī then quotes in support of the opinion the Caliph 'Umar's statement cited above, that a man is never secure when he is in pain and frightened and incriminates himself.[113]

The proponents of pre-trial beating have quoted the following evidence in support of their position:

1. Anas ibn Mālik reported that a Jewish man crushed the head of a woman in between two stones and the case was brought before the Prophet (peace be on him) where the victim barely managed to identify her attacker. The Prophet

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[109]Ghazālī, *Shifā' al-Ghālīl*, 229; idem., *al-Mustasfā*, 1: 297; Ibn Ḥazm, *al-Muḥallā*, 8: 141; al-Bājī, *Muntaqā*, 7: 166; Ibn Farḥūn, *Tabṣirah*, 2: 158.

[110]Ghazālī, *Shifā' al-Ghalīl*, 229.

[111]Ḥākim, *al-Mustadrak*, 2: 198. Bukhārī, has recorded the same *ḥadīth* with slight variation in wording. See *Ṣaḥīḥ al-Bukhārī*, 8: 527, *ḥadīth* no. 805.

[112]Saḥnūn, *al-Mudawwanah al-Kubrā*, 6: 293.

[113]Shams al-Dīn Muḥammad al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, n.d.), 24: 70.

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(peace be on him) did not release the accused until he confessed to his crime for which he was subjected to retaliation in like manner.[114]

The conclusion drawn from this *ḥadīth* is that the Jew did not make a confession at first and it appears that he was threatened or beaten until he made it, and hence the beating of the accused during investigation is permissible.

2. It is reported in conjunction with the story of Ḥāṭib ibn Abī Balta'ah that when the Prophet (peace be on him) decided to conquer Makkah, Ḥāṭib wrote to the Makkans a letter about the Prophet's intention, and sent it with a woman whom he trusted. When the Prophet (peace be on him) learned of this, he sent 'Alī ibn Abī Ṭālib, Zubayr and Miqdād to stop her and retrieve the letter. So they went riding on horses until they found the woman and asked her to hand over the letter. She said: "I have no letter with me". But she was told: "Either you hand over the letter or you will be stripped naked". Then she brought the letter out of the pleats of her hair.[115]

The fact that the said Companions threatened the woman and pressurised her is taken to mean that applying punitive tactics on the accused for the purpose of investigation is permissible.[116]

3. Anas ibn Mālik has reported that the Prophet (peace be on him) sent out a reconnaissance party to Badr. On their way to Badr, they met some camel riders of the Quraysh tribe and there was among them a black slave of the clan of Banū 'l-Ḥajjāj. The Companions seized the man and questioned him about Abū Sufyān and his followers. The man said: "I do not know about Abū Sufyān but these are Abū Jahl, Shībah, 'Utbah, and Umayyah ibn Khalaf". They beat him until he said: "Yes, I can tell you this is Abū Sufyān". So they let him go, but then he was asked again the same question, and again he denied knowing anything about Abū Sufyān. Upon hearing this, they beat him again. The Prophet (peace be on him) had by then finished his prayer and when he noted what had happened, he said: "By Him in whose hand my life reposes: you beat him when he told you the truth and you released him when he lied to you".[117]

In this episode since the Companions beat the man on the basis of suspicion. It has been argued by some scholars that it is permissible for the authorities to threaten the accused and beat him until he tells the truth.

4. In conjunction with the incident of the slander of the Prophet's wife, 'Ā'ishah, it is reported that the Prophet (peace be on him) summoned 'Ā'ishah's servant, Barīrah, and questioned her over the incident. 'Alī, who was present on the occasion, struck Barīrah hard and told her to reveal the truth to the Prophet

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[114]Muslim, *Mukhtaṣar Ṣaḥīḥ*, 272, *ḥadīth* no. 1028.
[115]Bukhārī, *Ṣaḥīḥ*, 4: 19; Muslim, *Ṣaḥīḥ*, 4: 1941; Abū Dāwūd, *Sunan*, 3: 47.
[116]Ibn al-Qayyim, *al-Ṭuruq*, 9; Ibn Farḥūn, *Tabṣirah*, 2: 139.
[117]Muslim, *Ṣaḥīḥ Muslim*, 3: 1404; Abū Dāwūd, *Sunan*, 3: 58.

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> (peace be on him). Barīrah spoke and said whatever she knew about 'Ā'ishah and there was nothing in her knowledge but good. She then told about the household work she had done during the day but this did not bring any new information either.[118]

It is concluded from this incident that 'Alī apparently suspected Barīrah of hiding information and struck her for that reason, which indicates the permissibility of what he did, especially in view of the fact that the Prophet (peace be on him) did not object to his action.[119] Ibn al-Qayyim observes: "Beating is permissible if someone who is believed to know the truth denies it. The *'ulamā'* are in agreement on this".[120] With reference specifically to "the accused who is known – *idhā 'urifa* – to be in possession of (stolen) goods but conceals and denies it – he is beaten in order to confess, and there is no doubt in this. He is beaten in order to fulfil an obligation which is to return the stolen property to its owner".[121]

Ibn Farḥūn has also referred to Ibn al-Qayyim on the issue of beating and has, in fact, quoted the above passage in reference only to:

> . . . one who is accused of crimes such as theft, highway robbery, murder and adultery. These may be interrogated and pressurised in proportion to the nature of the accusation and their reputation for such (crimes). They may sometimes be beaten, or detained without beating, depending on their past record and reputation. Ibn al-Qayyim has said 'Beating is permissible if someone who is believed to know the truth denies it'.

Ibn Farḥūn closes his discussion by saying, once again, that "it is permissible to beat or detain this category of accused persons when it is valid in the *Sharī'ah*".[122]

The Mālikī jurist al-Bājī has written with reference to:

> The accused who is obscure and has no criminal record, the manifest *(ẓāhir)* ruling of the *Mudawwanah* requires that he may not be beaten but may be asked to take an oath (as to his innocence), and according to one opinion, he should be released without taking an oath. The position therefore is that if the accused has a corresponding reputation, he may be threatened, detained and put on oath, but if he has no such reputation, he may not be subjected to any of these; and if he is an upright person, his accuser may be punished.[123]

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[118]'Alā' al-Dīn al-Ṭarāblusī, *Mu'īn al-Ḥukkām* (Cairo: Al-Maṭba'ah al-Maymaniyyah, 1323 A.H.), 171.

[119]Ibn Farḥūn, *Tabṣirah*, 2: 137; see also al-Ṭarablusī, *Mu'īn al-Ḥukkām*, 171.

[120]Ibn al-Qayyim, *al-Ṭuruq*, 106; Shāṭibī, *al-I'tiṣām*, 2: 120.

[121]Ibid., 108.

[122]Ibn Farḥūn, *Tabṣirah*, 2: 157–158.

[123]Bājī, *al-Muntaqā*, 7: 166.

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Ibn Farḥūn has once again verified the position and has, in fact, quoted Bājī's statement mentioned above *en toto* only to agree with it and confirm it.[124]

'Alwānī has also discussed the views of some *'ulamā'* on this issue and has, in particular, quoted Ibn 'Ābidīn's opinion, which is as follows: "Beating one accused of theft is a matter of judicial policy, so opined al-Zayla'ī. A *qāḍī* may do what is politically expedient, as policy matters are not the exclusive domain of the *Imām*". Having quoted Ibn 'Ābidīn, 'Alwānī then immediately writes that "there is nothing to support the opinions offered by these scholars ... Moreover none of these reasons refutes or even weakens the evidence gathered by the majority of jurists that it is illegal to obtain a confession through the use (or threat) of force. Their opinions would be valid if there were contributing circumstances that indicated clearly that the accused was guilty ...".[125]

Clearly, the *'ulamā'* are in disagreement over the legality of beating. Ibn al-Qayyim, Bājī and Ibn Farḥūn have reserved beating during interrogation to only one class of the accused, namely the notorious criminals, especially in cases of theft and highway robbery where the veracity of a possible confession can be ascertained by the subsequent discovery or otherwise of the stolen goods that the accused might have concealed.

Moreover, having summarised the evidence in the *Sunnah* that is quoted in support of beating the accused, we note that none of the four *aḥādīth* that have been quoted above provide conclusive evidence as virtually everyone of them is open to some level of doubt. Ibn Ḥazm al-Ẓāhirī has discussed most of the relevant *aḥādīth* and has explained why they were doubtful. With regard to the first report, Ibn Ḥazm has noted that it is vague and does not establish for a fact that the Prophet (peace be on him) either threatened or punished the Jew before he made a confession; it remains, in other words, inconclusive.[126]

With reference to the second report, it is suggested that the Prophet (peace be on him) knew for a fact that the woman was carrying the letter in question; so it was not a case merely of accusation, but one which involved acting on the basis of knowledge. The *ḥadīth* is, therefore, not relevant.

As for the third *ḥadīth*, the Prophet (peace be on him) actually expressed disapproval of punishing the black man and his remark intimated that those who punished the accused should have been more careful in the first place. It cannot, therefore, establish the permissibility of pre-trial beating.

With reference to the fourth *ḥadīth* concerning Barīrah, there is, once again, some doubt in respect of the precise details of what happened on the occasion. For the same *ḥadīth* has been reported in some collections with the words that "some of the Companions rebuked her (*intaharahā*) and asked her to tell the truth to the Messenger of God ...". There is no mention of beating

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[124]Ibn Farḥūn, *Tabṣirah*, 2: 162.

[125]'Alwānī, "The Right of the Accused in Islam" (part two), *AJISS* 2 (1994), 512, quoting Ibn 'Ābidīn, *Hāshiyah*, 3: 259.

[126]Ibn Ḥazm, *al-Muḥallā*, 8: 132; Fahd al-Suwaylim, *al-Muttaham*, 116.

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Barīrah in this version of the *ḥadīth* and the facts of the matter are somewhat doubtful.

To sum up, the permissibility of beating the accused during investigation requires clear sanction, which is not available: neither in the Qur'ān nor in the *Sunnah*. What remains for us to discuss here is the case based on considerations of public interest (*maṣlaḥah*), which the advocates of beating have used as the centre-piece of their juristic reasoning. Shāṭibī has examined the evidence and I summarise his argument as follows:

With regard to beating the accused, the *'ulamā'* are in disagreement. Those who have validated detention of the accused have also validated beating, for detention is a form of torture and so is beating. The advocates of this view have claimed that their position was analogous to that of the trustee responsible for the manufacture of certain goods, such as a tailor who receives a piece of cloth from a client to make a dress. The trustee (*amīn*) is normally not responsible for damage or loss to the goods in his custody unless it is proved that he was negligent. But the *'ulamā'* have held that the trustee in the manufacture of goods is also a guarantor who is responsible for the loss of goods that are placed in his custody.

I may intervene here to explain that the analogy between beating the detainee and the responsibility of the trustee. The two have an aspect that is common to both since both involve a measure of arbitrary judgment as the upright and the miscreant are, in both cases, treated on the same footing. But then it is stated that if beating and detention of the accused were not allowed, it would be difficult to protect the properties of people against thieves and usurpers, as producing incriminating evidence is usually difficult, especially in the case of theft. The benefit (*maṣlaḥah*) that is involved in holding the trustee responsible for the loss of goods in his custody is upheld by general consensus *(ijmā')*, and the same logic is now extended to the case of beating the accused.

As for the objection that beating in this case might mean torturing the innocent which amounts to (*ḍarar*) Shāṭibī wrote:

> To do otherwise might be even more harmful. This is notwithstanding the fact that no one validates beating on the basis merely of a claim, but only when the latter is accompanied by supportive clues (*qarā'in*) that penetrate the thought and judgment of the observer and create a reasonable suspicion on his part. The innocent is, therefore, not very likely to fall a victim to *ḍarar*; but if he does so, then that partakes in a pardonable error, somewhat similar, that is, to the error that is possible in the case of a craftsman who is held responsible for the goods he has received into his custody.
>
> As for the question that beating is futile if it leads to a confession that is null and void, it is said that: "If it leads to retrieving the stolen property, then it is beneficial". If the accused, who is beaten or threatened with beating, makes a confession which leads to the discovery of the stolen goods, then the confession in question may also be validated. Beating the accused also serves as a deterrent

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which dissuades people from criminality and corruption.[127]

The whole of this argument is thus premised on considerations of public interest (*maṣlaḥah*) which also involve the possibility of mischief (*mafsadah*) arising in the process. In the event of a conflict between *maṣlaḥah* and *mafsadah*, the issue is normally determined on rational grounds which takes into consideration the balance of evidence and the attending circumstances of each case.

I submit that the *maṣlaḥah* in question might have warranted a judgment in favour of beating the accused in earlier times when the police was, on the whole, poorly equipped with crime detection facilities. Although criminality continues to be a menace to society no less than it ever was, perhaps the police and law enforcement agencies are better equipped now and can utilise more advanced methods from finger printing to laboratory analyses and other data collection methods that were not possible in earlier times. This might mean that we ought to give preference to the prevention of evil *(dar' al-mafsadah)* in the case before us to that of securing the benefit that might be involved, a position which is in harmony with the general guidance of the *Sharī'ah* and the legal maxim that "prevention of harm takes priority over the acquisition of benefit".

Comparing the evidence for and against the permissibility of pre-trial beating, it seems that the evidence against it is more persuasive and it is also in harmony with the basic presumption of the *Sharī'ah* which maintains original non-liability *(barā'at al-dhimmah al-aṣliyyah)* to be the normal state unless proven otherwise. The case of dangerous criminals against whom the society needs to be protected may be looked at individually within the context perhaps of *siyāsah shar'iyyah*. As already noted, this doctrine entitles the head of the state and the judges to exercise discretion so as to provide an adequate response to exceptional situations where the normal rules of law might fall short of providing one. The government may accordingly devise a special procedure for dangerous criminals and treat the issue on that basis. As for the permissibility in principle of pre-trial beating, the case against it is clearly a strong one. Since pre-trial beating is aimed at extracting self-incriminating confession from the accused, and confession under duress is invalid, it must, therefore, be seen as an exercise in futility and *ultra vires*.

VII

THE RIGHT TO COUNSEL

The *Sharī'ah* recognises the right of both plaintiff and accused to present evidence and to have access to counsel during pre-trial interrogation, at the trial

[127]Shāṭibī, *al-I'tiṣām*, 2: 120.

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and, if the accused is convicted, at the execution of the sentence. The principle that applies here is that of *wakālah* (agency) and the parties are both equally entitled to appoint a representative. This is because it is possible that the party concerned is not sufficiently knowledgeable to present his/her case effectively or that he/she is unable to attend the court. There is no disagreement among the *'ulamā'* over the validity of representation in all civil claims involving disputes over the Rights of Man (*ḥaqq al-ādamī*), but the *'ulamā'* have held different views on *wakālah* concerning matters that involve violation of the Right of God (*ḥaqq Allāh*).

The Ḥanafīs have expressed reservations about *wakālah* in regard to the prescribed offences of *ḥadd* that form mainly part of the rights of God. Thus it is said that in *ḥadd* offences such as adultery and drinking, the issue before the judge usually concerns the sufficiency or otherwise of proof, as these offences usually do not involve litigation, and judicial proceedings over them consist mainly of presentation of evidence, and there is often no plaintiff or private litigant. Since the *ḥadd* offences of adultery and drinking usually do not involve a private claim, representation is said to be not necessary. If the proof consists of confession, then *wakālah* is not valid in confession, and if it consists of testimony, once again, there is no need for *wakālah*. But if the offence in question consists mainly of violation of the Rights of Man, such as slanderous accusation, the dominant Ḥanafī view permits representation on either side.[128] The Shāfi'īs have basically concurred with the Ḥanafīs and consider representation in prescribed offences (*ḥudūd*) generally invalid, except in slanderous accusation, on the analogy that the *Sharī'ah* counsels restraint in inflicting the penalties laid down for *ḥudūd* offences whereas representation usually seeks to promote and facilitate proof.

It will be noted, however, that this whole argument is somewhat lop-sided as representation may seek to disprove and deny the charge just as it may also seek to secure the proof of the *ḥudūd*.[129] This is basically why the Mālikīs and the Ḥanbalīs maintain the view that representation is valid in all offences, including the *ḥudūd*. The head of the state may be represented by public prosecutor in such offences just as the defendant may also wish to be represented in the court. This is the majority view and it applies equally to offences involving just retaliation (*qiṣās*) and deterrent punishment (*ta'zīr*). For they too involve violation of the rights of Man and *wakālah* over them is valid, despite some differences of opinion that have arisen over details. The right to retain counsel is thus a general right that extends to all disputes.

A question has arisen concerning the consent of one's opponent in the event where only one of the two sides resorts to *wakālah*. Abū Ḥanīfah has

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[128] Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 4: 21.

[129] Abū Isḥāq Ibrāhīm ibn 'Alī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī*, (Cairo: Dār al-Fikr, n.d.), 1: 349; al-Sharbīnī, *Mughnī 'l-Muḥtāj*, 2: 221; Awād, "Rights of the Individual Under Islamic Procedure", in Bassiouni, *Islamic Criminal Justice*, 97.

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held that *wakālah* in such a case is not valid without the consent of the other litigant, who may be unable to have a representative (*wakīl*) and may also be unable to defend himself equally well. The opponent's consent is not necessary, however, according to this view, in situations of necessity, such as travelling or illness, or when a woman who is not habituated to mix with men and appoints a *wakīl* to handle the case on her behalf. This is valid even without the consent of the other party. The majority, that is, the Shāfi'īs, Mālikīs, Ḥanbalīs and the two disciples of Abū Ḥanīfah, Abū Yūsuf and al-Shaybānī, have ruled, however, that *wakālah* is permissible generally with or without the consent of the opponent. They maintain that the disagreement of one litigant should not deprive the other of his right to representation. One of the parties may well be unable to defend itself and wish to be represented, just as it is possible that the other party is more capable to defend himself personally and decides not to appoint a *wakīl*. Now if we make these decisions contingent on the consent of the other party, it might cause harm, and lead to delays if the consent is not granted in good time.[130]

The *'ulamā'* are generally in agreement that the purpose of representation, whether in civil litigations or crimes, is to vindicate the truth and facilitate justice. Representation may not, in other words, seek to distort justice and advocate falsehood by recourse to deceitful and time-consuming methods. Hence it is forbidden for a person to represent another in the event where the former knows that his principal is in the wrong.[131] Representation is valid, however, in the event where the representative only doubts the veracity of his client's claim. Textual authority for these views is found in the Qur'ānic address to the Prophet to:

> Be not a pleader on behalf of the treacherous. (*al-Nisā'* 4: 105)

Some *'ulamā'* have gone so far as to maintain that it is not permissible for anyone to litigate on behalf of another unless he knows the truth of the matter. If it appears to him to be a right cause, he should accept representation, but should reject it otherwise. Representation is, therefore, unlawful in the event where it seeks to distort the truth in pursuit of falsehood.[132] Support for this position also comes from the *ḥadīth*, reported by 'Ā'ishah, that the Prophet (peace be on him) said:

> The most disliked man before God Most High is one who stubbornly litigates in

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[130]Al-Kāsānī, *Badā'i'*, 6: 22; Abū 'Abd Allāh al-Maqdisī ibn Qudāmah, *al-Mughnī* (Riyadh: Maktabat al-Riyād al-Ḥadīthah, n.d.), 5: 89–90; Shīrāzī, *al-Muhadhdhab*, 1: 355.

[131]'Alā al-Dīn Ibn al-Ḥasan 'Alī Ibn Sulaymān al-Mardawī, *al-Insāf fī Ma'rifat al-Rājih min al-Khilāf 'alā Madhhab al-Imām al-Mujbal Aḥmad ibn Ḥanbal*, ed. Muḥammad Ḥāmid al-Faqī, (Cairo: Maṭba'at al-Sunnah al-Muḥammadiyyah, 1376/1956), 5: 394; Manṣūr Ibn Yūnus Idrīs al-Būhūtī, *Kashshāf al-Qannā' 'an Matn al-Iqnā'*, ed. Hilāl Mustafā Hilālī, (Beirut: Dār al-Fikr li'l-Ṭabā'ah wa'l-Nashr, 1402/1982), 3: 483.

[132]Ibn Farḥūn, *Tabsirah*, 1: 159.

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pursuit of falsehood.[133]

According to another *ḥadīth*:

> One who litigates in pursuit of falsehood while he knows it shall remain afflicted with the wrath of God until he disengages himself from it.[134]

Court decisions must, accordingly, be founded in what is known to be the truth and everyone involved, including the judge, witnesses, and litigants are bound by this requirement.

Conclusion

I may conclude this paper by saying, once again, that criminal judicial procedure in the *Sharī'ah* remains largely open to the prospects of refinement and growth within the general framework of *siyāsah shar'iyyah*. The textual guidelines of the Qur'ān and *Sunnah* on criminal procedure that I have examined in this essay generally point to the same direction in so far as Islamic law supports any procedure that advances the cause of justice and fair treatment and does not, in the meantime, violate considerations of public interest (*maṣlaḥah*). *Siyāsah shar'iyyah* is itself predicated on *maṣlaḥah* and it is, as such, changeable as it must respond to the exigencies of time and circumstance and cannot, as it were, be all predicted and legislated in advance. Even if the broad outlines of *siyāsah shar'iyyah* on criminal procedure were to be codified, the head of the state and judges would still be left with a measure of discretionary powers under *siyāsah shar'iyyah* which they can utilise in response to exceptional and emergency situations that cannot be adequately dealt with under the normal rules of the *Sharī'ah*.

Finally, it needs to be mentioned that there is a daunting gap between the theory and practice of the *Sharī'ah* in this area. Even a cursory glance at the juridical guidelines of the *Sharī'ah* and the prevailing practices of governments in the present-day Muslim countries is enough to show the nature of the challenge. One can hardly be more explicit in conveying this concern than what 'Alwānī has observed in one of his articles that "it is indeed shameful for us today to see that certain Muslim majority states are not at all concerned with human dignity and rights and that they wilfully ignored the guarantees designed to protect those rights ... Their tyranny serves only to distort the truth of Islam and the ways in which it upholds justice".[135] Some of these governments have indeed become immersed in mistrust, suspicion and espionage against their own people to an alarming extent. The sensitivities that are voiced by the normative guidelines of Islam and the juristic heritage of its leading *'ulamā'* is a far cry

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[133]Tirmidhī, *Sunan al-Tirmidhī*, *ḥadīth* 2976.

[134]Abū Dāwūd, *Sunan*, 3: 305; Bayhaqī, *al-Sunan al-Kubrā*, 6: 82.

[135]'Alwānī, 'The Rights of the Accused', *AJISS*, 2 (1994), 518

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from what is being practiced in many parts of the Muslim world today. It is not surprising, therefore, to see that resistance and insurgency in Muslim societies have consistently found cause to wage a campaign against oppressive government practices and have done so often from an Islamic platform. Without wishing to condone insurgency and violence, the fact remains that resistance movements are often driven to despair, extremism and violence by the brutality of these rulers, and the absence of reciprocity and dialogue. If the world community views the Muslims as generally trigger-happy and violent, it is due, in no small measure, to the mistrust and suspicion that oppressive Muslim governments have displayed against their own citizens, and at times with the connivance and even covert encouragement of the nations committed to oppose oppression and tyranny.

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